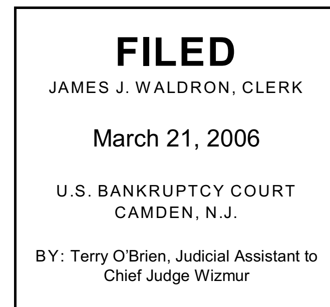
NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the matter of	:	Case No. 01-11917/JHW
Tri-State Armored Services, Inc.	:	
Debtor	:	
		Adv. No. 01-1132
Great American Insurance Companies	:	
Plaintiff	:	
v.		
	:	**OPINION ON EQUITABLE ESTOPPEL CLAIMS**
Thomas J. Subranni, Esquire, Trustee for the Estate of Tri-State Armored Services, Inc.	:	
	:	
Defendant	:	



APPEARANCES:

Claudine Q. Homolash, Esq.
John N. Ellison, Esq.
Anderson Kill & Olick
1600 Market Street, Suite 3200
Philadelphia, PA 19103
Attorney for Thomas J. Subranni,
Trustee for the Estate of
Tri-State Armored Services

Steven N. Dratch, Esq.
Julian Wilsey, Esq.
Franzblau Dratch
354 Eisenhower Parkway, Plaza One
Livingston, New Jersey 07039
Attorney for Great American Insurance Companies

Thomas Subranni, Esq.
Nona L. Ostrove, Esq.
Subranni & Ostrove
1000 White Horse Road, Suite 508
Voorhees, New Jersey 08043
Attorney for Trustee for the Estate of
Tri-State Armored Services, Inc.

John G. Buchanan, III, Esq.
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20008
Attorney for NCR Corporation

Ronald L. Glick, Esq.
Stevens & Lee
1415 Route 70 East
Cherry Hill, New Jersey 08034
Attorney for Diebold, Inc.

Barbara Lanza Farley, Esq.
13 Wilkins Avenue
Haddonfield, New Jersey 08033
Attorney for Palm Desert National Bank

We have before the court competing motions for summary judgment by Great American Insurance Companies ("Great American") on the one hand, and Diebold, Inc., Palm Desert National Bank, and NCR Corporation (collectively referred to herein as the "Loss Payees") on the other hand, regarding the remaining equitable estoppel claims asserted by the Loss Payees.[1]

[1] Palm Desert National Bank was the holder of a Certificate of Insurance from Great American, and did not have a formal designation of "Loss Payee". There is no need on this record to distinguish Palm Desert from Diebold and NCR, who were designated as Loss Payees on their Certificates of Insurance.

FACTS AND PROCEDURAL HISTORY

In response to Great American's adversary complaint seeking a declaratory judgment that coverage did not exist under the employee dishonesty, crime, and disappearance insurance policies it had issued to Tri-State Armored Services, Inc., the Loss Payees intervened and filed a five-count counterclaim, alleging breach by Great American of the duty to provide the Loss Payees with insurance benefits, promissory estoppel, equitable estoppel, implied contract and misrepresentation. In a written opinion rendered on March 13, 2002, I granted the motion of Great American to dismiss four of the five counts of the Loss Payees' counterclaim, leaving only the equitable estoppel claims unresolved.

This is the third attempt by Great American to dismiss the equitable estoppel claims of the Loss Payees. In this court's March 13, 2002 opinion, I first denied Great American's motion to dismiss the equitable estoppel claims, concluding that "[i]f the counterclaimants establish [as they alleged in their counterclaim] that Great American knew that Tri-State had committed thefts and would not be entitled to receive insurance proceeds, but maintained the policy in force, issuing loss payee endorsements which were worthless, but upon which the Loss Payee Intervenors reasonably relied to their detriment,

then Great American may be bound to provide coverage to the Loss Payees." In re Tri-State Armored Servs., Adv. No. 01-1132, at 30 (Bankr. D.N.J. Mar. 13, 2002) (unpub. opin.).

On December 16, 2002, Great American moved for summary judgment, seeking rescission of the insurance policies issued to Tri-State for the years 1997 through 2000 on the ground of equitable fraud. Alternatively, Great American relied upon contract exclusions to deny Tri-State coverage. Oral argument was held on March 19, 2003. Great American's motion was denied by written opinion dated July 29, 2003. In a supplemental letter opinion dated August 13, 2003, I granted Great American's second motion for summary judgment on the equitable estoppel claims of the Loss Payees. I determined "that the only representation made by it to the Loss Payees, by the issuance of the endorsements, was that if Tri-State had insurance covering claimed losses, then the proceeds of such coverage would be payable to the Loss Payees and to Tri-State as joint payees." In re Tri-State Armored Servs., Inc., Adv. 01-1132, at 5 (Bankr. D.N.J. Aug. 13, 2003) (letter opin.). "Under the terms of the Loss Payee endorsements, there [was] no indication that Great American intended the Loss Payees to have any rights under the policy that were greater than those awarded to Tri-State." Id. Drawing all factual inferences in favor of the Loss Payees, I determined that I could not

> conclude that Great American actually knew, prior to the issuance of the insurance policies and Loss Payee endorsements each year from 1997 through 2000, that employee theft of customer funds had occurred at Tri-State, that Tri-State made material misrepresentations on its insurance applications, and that Great American could seek rescission of the insurance policies when it issued the Loss Payee endorsements.

Id. at 8. In the alternative, I concluded that Great American could not "be charged with an act or omission which was designed to actively, directly and deliberately induce the Loss Payees to take action, i.e., to do business with Tri-State." Id. at 14. "The insurer simply represented to the Loss Payees that Tri-State had procured insurance coverage, and that if, and to the extent that insurance proceeds were payable to Tri-State, the proceeds would be jointly payable to Tri-State and to the Loss Payees." Id.

On the eve of the trial of Great American's rescission and exclusion claims against Tri-State, Diebold moved for reconsideration of the granting of summary judgment to Great American against the Loss Payees. On September 23, 2003, I agreed orally to reconsider the equitable estoppel issue. The Loss Payees argued that facts may be developed at trial that Great American issued certificates of insurance to the Loss Payees, without the intention of ever providing coverage to Tri-State, i.e., with a predisposition to seek rescission of the insurance contract with Tri-State should a loss occur, despite the knowledge that the Loss Payees would rely on the certificates. I

accepted the contention by the Loss Payees that the application of the principle of equitable estoppel was fact sensitive, and coincided, at least as to Great American's actions or inactions, with the quest by Great American to rescind the insurance contract. I determined to bifurcate the trial, permitting the Loss Payees to participate fully at trial.[2] It was envisioned that the first stage of the litigation would focus on the rescission and contract exclusion claims of Great American against Tri-State, and the Tri-State counterclaims against Great American. The second stage of the litigation would pertain to the equitable estoppel claims of the Loss Payees against Great American, each of whom would be given the "opportunity to supplement the main trial with any information that is otherwise relevant to the equitable estoppel claim,"[3] such as defenses to equitable estoppel focused upon the knowledge and activities of Diebold and NCR (the Loss Payees). The trustee's adversary complaint was then tried over 17 days, between September 30, 2003 and February 3, 2004.

On October 3, 2005, in a published opinion, I granted Great American's quest to rescind the 1999 and 2000 policies based on equitable fraud principles. In re Tri-State Armored Servs., Inc., 332 B.R. 690 (Bankr. D.N.J. 2005).

---

[2] T51-8 (9/23/03).

[3] Id. at T51-13 to 14.

On January 10, 2006, Great American renewed its application for summary judgment to dismiss the equitable estoppel claims of the Loss Payee intervenors. Great American contends that this court's determination in its August 13, 2003 supplemental letter opinion sets forth the correct result, and that the "Loss Payee Intervenors cannot establish that Great American did, or did not do, any act that was knowingly designed to induce them to do business with Tri-State; hence, the Loss Payee Intervenors cannot demonstrate that they are entitled to relief under the doctrine of equitable estoppel." Great American points out that "'[a] certificate of insurance is only evidence of insurance coverage, and not a separate and distinct contract for insurance or part of the insurance contract.'" GA Motion for Summ. Judg. at 12 (quoting 43 AM. JUR. 2nd, Insurance § 189). According to Great American,

> These [insurance certificates] were secured [by] Tri-State because their contracts with each of the Loss Payee Intervenors required them to have insurance, and to provide proof of the insurance; the contracts also required Tri-State to name the Loss Payee Intervenor as a "loss payee" or "additional insured." Obviously, when the Loss Payee Intervenors entered into their respective contracts with Tri-State, they assumed the risk that Tri-State might not be truthful with its insurer and jeopardize the coverage the Loss Payee Intervenors required; this risk can not be transferred to Great American.

Id. "A loss payee is not an insured but only 'a mere appointee [of the insured] who may not recover if the insured has breached any provision of the policy which would prevent recovery by him.'" Id. at 13 (quoting Highway Trailer Co.

v. Donna Motor Lines, Inc., 46 N.J. 442, 447, 217 A.2d 617, 620, cert. denied, 385 U.S. 834, 87 S. Ct. 77, 17 L.Ed.2d 68 (1966)). Thus, by receipt of a certificate of insurance, the recipient can only justifiably rely on the fact that a policy has been issued. Great American contends that what they knew or understood about the Loss Payees' reliance is irrelevant, because there was no contractual relationship between Great American and the Loss Payees, and no responsibility otherwise by the insurer to the Loss Payees. Finally, Great American contends that there is no "public policy" argument that coverage should be afforded to the Loss Payees based on their reasonable expectation of coverage, because unlike liability policies, which involve coverage for third parties, the coverage in this case was limited to the first party, Tri-State.

On January 30, 2006, Diebold (joined by Palm Desert) and NCR each filed a cross motion for summary judgment. Diebold highlights the undisputed fact that "Diebold relied upon the existence of the insurance coverage represented by the Policy and its status as a loss payee as represented by the Certificates as a precondition of doing business with Tri-State," and that "GA [Great American] knew that Diebold relied upon that coverage and would not have done business with Tri-State in the absence of such coverage." Diebold Cross Motion at 4. Diebold contends that under New Jersey law, loss payees "may acquire equitable rights beyond those stated in the loss payee certificate."

Id. at 5. Although not expressly seeking reconsideration of the court's opinion on the rescission of Tri-State's policy, Diebold challenges the decision in several respects, including the failure to note the internal inconsistencies in the Tri-State renewal applications submitted to Great American, the failure to recognize the selective reliance placed by Great American on the application, and the failure to attach consequences to Great American's seriously deficient underwriting practices. Diebold raises these concerns to support the proposition that the "cavalier" or "reckless" manner in which Great American issued renewals to Tri-State gave rise to a duty to the Loss Payees or created other equitable rights, particularly in light of Great American's knowledge of the commercial necessity for such insurance and its knowledge of the Loss Payees' reliance on those policies.

Palm Desert also renews the public policy argument that in some states, employee dishonesty insurance for armored car carriers is required. Therefore, the fact that the insurance is a "commercial necessity" should occasion the public policy determination to extend coverage to the Loss Payees.

NCR seeks to revisit the characterization of the insurance policies in this matter as first party insurance. NCR stresses that the policies did not cover Tri-State's assets, but rather the property of Tri-State's customers. NCR insists

that

> Whether the fine print showed the certificate holder to be an additional insured or a loss payee is a distinction without a difference in equity. The true significance of the certificates and endorsements was as evidence attesting that an insurer with specialized "expertise in risk control and assessment" had evaluated and approved Tri-State's security, and that a deep-pocketed insurer and its reinsurers had chosen to stand behind Tri-State in the event of a loss that exceeded Tri-State's ability to pay.

NCR Cross Motion at 9. NCR posits that it "could reasonably rely on GAIC [Great American] to take proper underwriting measures to evaluate that risk (employee dishonesty) before certifying to customers that their property was protected by its insurance." Id. at 10. Great American "is the one that promotes itself as the expert at risk assessment, and the one that is in the business of assuming and distributing risk, for a premium." Id. NCR contends that "[h]owever 'fundamentally fair' it might be to allow rescission against the successor to the insured that was allegedly lying to GAIC, it would be fundamentally unfair to impose this punitive remedy upon the handful of innocent customers who were specifically identified on the policy as beneficiaries of its protection, but who could not themselves participate in underwriting the insured risk." Id. at 17. It is NCR's position that functionally, the fidelity insurance in this case can be equated to a liability policy that can be reached by a third party.

DISCUSSION

Summary judgment is appropriate where the moving party is entitled to judgment as a matter of law, and where there exists no genuine dispute as to any material fact. Nebraska v. Wyoming, 507 U.S. 584, 590, 113 S. Ct. 1689, 1694, 123 L.Ed.2d 317 (1993); Fasold v. Justice, 409 F.3d 178, 183 (3d Cir. 2005); Caufield v. Center Area School District, 133 Fed.Appx. 4, 8 (3d Cir. 2005). Bankruptcy Rule 7056 makes Fed.R.Civ.P. 56 applicable to adversary proceedings. Rule 56(c) provides in pertinent part that the "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

To resolve these cross-motions for summary judgment, I rely on and incorporate herein the findings of fact set forth at In re Tri-State Armored Serv., Inc., 332 B.R. 690 (Bankr. N.J. 2005), particularly as to Great American's conduct in issuing the Tri-State policies, renewals and loss payee endorsements. No competent evidence has been submitted on these cross-motions for summary judgment to raise genuine issues of material fact as to

Great American's conduct.[4]

In their cross-motions for summary judgment, the Loss Payees have raised issues about the nature of the policies issued to Tri-State by Great American and the endorsements issued to the Loss Payees, the distinction between a named insured and a loss payee, and the difference between a fidelity policy and a liability policy. I discussed these issues at length in my opinion of March 13, 2002, wherein I dismissed four of the five counts of the Loss Payees' counterclaims. I will repeat portions of that opinion here, as those portions pertain to the resolution of the issues on these cross-motions. I will first review the relevant terms of the policy and loss payee endorsements issued by Great American to Tri-State. I will then discuss breach of contract, implied contract, promissory estoppel and misrepresentation, followed by the sole issue remaining, i.e., whether the principle of equitable estoppel serves to require Great American to honor the rescinded Tri-State policies by reimbursing the Loss Payees for their losses.

1. Policy Provisions and Loss Payee Endorsements.

---

[4] The parties have raised factual disputes regarding the conduct or knowledge of Diebold and NCR while Tri-State was still operating. The conduct or knowledge of the parties seeking equitable estoppel could constitute a valid defense to estoppel. Because I have determined to grant summary judgment to Great American, I need not resolve these issues of fact.

The named insured on the policy first issued by Great American in October 1997, and renewed each year through 2000, was Tri-State Armored Services, Inc. Under the "Crime General Provisions" form appended to the policy, the terms "you" and "your" refer to Tri-State. In pertinent part, paragraph 12 of Section A., General Conditions, of the "Crime General Provisions" provides as follows:

> 12. Ownership of Property; Interests Covered: The property covered under this insurance is limited to "customer's" property:
>
> (a) that you hold; or
> (b) for which you are legally liable.
>
> However, this insurance is for your benefit only. It provides no rights or benefits to any other person or organization.

The term "customer" is defined as "the person or entity with whom the insured agrees to perform armored car services pursuant to tariff documents, bills of lading or shipping receipts." Id. at Section D. General Definitions, ¶ 5. The coverage for "Employee Dishonesty" is specified as follows:

> A. COVERAGE
>
> We will pay for loss of, and loss from damage to, Covered Property resulting directly from the Covered Cause of Loss.
>
> 1. Covered Property: "Money", "securities", and "property other than money and securities" which is the property of others as described in tariff documents, bills of lading or shipping receipts, while in your care, custody, and control. Covered property also includes your money used for the benefit of customers as part of the armored car services performed for

customers, while in your care, custody and control.

2. Covered Cause of Loss: "Employee Dishonesty."

"Employee Dishonesty" is defined in subsection D.3.a. of the policy as:

> only dishonest acts committed by an "employee", whether identified or not, acting alone or in collusion with other persons, except you or a partner, with the manifest intent to:
>
> (1) cause your customer(s) to sustain loss; and also
>
> (2) obtain financial benefit . . . for:
>
> (a) the "employee"; or
>
> (b) any person or organization intended by the "employee" to receive that benefit.

To summarize, the policy was explicitly for the benefit of Tri-State only, and provided no direct benefit to any other person or entity. Tri-State was insured by Great American for losses it sustained to customers' property which were caused by acts of employee defalcation or unexplained disappearance.

The "Joint Loss Payable" endorsement to the Great American policy,[5] naming Diebold and NCR, among others, provides as follows:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT

---

[5] There is a separate endorsement for each loss payee.

CAREFULLY.

JOINT LOSS PAYABLE

A. PROVISIONS

> You agree that any loss payable under the Coverage Form indicated above shall be paid jointly to you and the Loss Payee, as their interests may appear, designated below:
>
> Diebold, Inc.
> (NAME OF LOSS PAYEE)
>
> . . .
>
> and any such payment shall constitute payment to you. We agree that we will make all such payments jointly to you and the Loss Payee, and we will not make any payment solely to you unless we receive a request in writing from the Loss Payee to make such payment to you.

B. Our liability under the Coverage Form indicated above as extended by this endorsement shall not be cumulative.

C. No rights or benefits are bestowed on the Loss Payee other than payment of loss as set forth herein.

By this endorsement, the Loss Payees were afforded the right to be paid jointly with the insured, Tri-State, for any covered losses sustained by Tri-State under the Great American policy.

2. Breach of Contract.

It has been held that the right to recover under a fidelity bond for

employee defalcation belongs solely to the insured, and may not be extended to encompass claims by third parties, absent some provision in the bond to the contrary. Resolution Trust Corp. v. Moskowitz, 845 F. Supp. 247, 250 (D.N.J.), vacated in part on reconsideration, No. CIV. A. 93-2080, 1994 WL 475811 (D.N.J. Aug. 31, 1994). In the Moskowitz case, a nearly identical factual setting was presented. The insurer agreed to indemnify the insured, a banking institution, for losses incurred "resulting directly from dishonest or fraudulent acts committed by an Employee." Id. at 249, n.2. Under a section entitled "Ownership", the fidelity bond policy stated the following:

> This bond shall apply to loss of Property (1) owned by the Insured, (2) held by the insured in any capacity, or (3) for which the Insured is legally liable. This bond shall be for the sole use and benefit of the Insured named in the Declarations.

Id. at 250.

The court focused on the difference between fidelity bonds and liability insurance. A fidelity bond is an indemnity insurance contract, whereby the insurer agrees to indemnify the insured against loss arising from employee dishonesty. On such a contract, the insurer is liable only in the event of a loss sustained by the insured. Id. (citing to Ronnau v. Caravan Int'l Corp., 468 P.2d 118, 122 (Kan. 1970)). In other words, fidelity bonds are "'a form of first party coverage, indemnifying the obligee for its loss, and are not a form of third

party coverage, indemnifying the insured for its liability to third persons.'" Id. (quoting Three Garden Village L.P. v. U.S.F.&G. Co., 567 A.2d 85 (Md. 1989)). See also Anderson v. Employers Ins. of Wausau, 826 F.2d 777, 780 (8th Cir. 1987). In contrast, liability insurance protects against claims for losses to persons or property (owned by such stranger) not a party to the contract. Moskowitz, Id. (citing to Everhart v. Drake Mgmt, Inc., 627 F.2d 686, 691-92 (5th Cir. 1981)). Because the policy in Moskovitz insured solely the insured, for losses incurred by the insured on account of property "held by the insured" or "for which the insured is legally liable", the policy was designated a fidelity bond. A fidelity bond does not encompass third-party claims.

In this case, the language in the policy compels the same conclusion reached in the Moskowitz case, that where the express terms of the policy limit any right of recovery to the named insured, recovery under the policy is limited to the named insured, and third party claims against the insurance proceeds must be rejected. While the coverage provided in the Great American policy to Tri-State includes both loss of customers' property held by Tri-State and loss of customers' property for which Tri-State is legally liable, the policy expressly confirms that the coverage is "only" for Tri-State's benefit, to cover Tri-State's losses, and "provides no rights or benefits to any other person or organization." Crime General Provisions, ¶ 12. As Moskowitz reflects, under New Jersey law,

"[i]t is well settled that when the terms of an insurance contract are clear and unambiguous, it is the court's duty to enforce the contract as written and in accordance with its plain and commonly understood meaning." 845 F. Supp. at 249.

Several New Jersey cases have confirmed that customers do not have a direct right of action against the insurer, where the policy expressly provides that coverage is limited to indemnification of the insured for its losses. Losses include loss of property which came into the possession of the insured in trust, and loss suffered by a bailee in incurring legal liability to its bailors/customers. See, e.g., Shapiro Bros. Factors Corp. v. Automobile Ins. Co. of Hartford, Conn., 40 F. Supp. 1 (D.N.J. 1941); London Assurance v. Bigeleisen, 135 N.J. Eq. 564, 39 A.2d 494 (E&A 1944); Crown Fabrics Corp. v. Northern Assurance Co., 124 N.J.L. 27, 10 A.2d 750 (E&A 1940).

The reliance by the Loss Payees on third party beneficiary status as a means to reach Great American must also be rejected. See Werrmann v. Aratusa, Ltd., 266 N.J. Super. 471, 630 A.2d 302 (App. Div. 1993); Rieder Communities Inc. v. Township of North Brunswick, 227 N.J. Super. 214, 546 A.2d 563 (App. Div.), certif. denied, 113 N.J. 638, 552 A.2d 164 (1988); Gold Mills, Inc. v. Orbit Processing Corp., 121 N.J. Super. 370, 297 A.2d 203 (Law

Div. 1972). In Werrmann, an injured patron of a business establishment qualified as a third-party beneficiary with opportunity to sue an insurance broker directly for its failure to procure insurance on behalf of the business establishment. In Rieder, land developers who attempted to enforce an agreement between two municipalities did not have third-party beneficiary status to sue the municipalities for enforcement. In Gold Mills, Inc., the owner/bailor of certain goods was not deemed to be a third-party beneficiary who could sue a detective agency. The agency contracted with the defendant bailee to provide security for the bailee's premises and property, including the property of the plaintiff-owner, which was stolen from the bailee's premises. In all three of these cases, the standard applied by the courts to determine third-party beneficiary status, i.e., to permit suit upon the contract made for their benefit without privity of contract, is "'whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts.'" Rieder Communities, Inc., 227 N.J. Super. at 222, 546 A.2d at 566 (quoting Borough of Brooklawn v. Brooklawn Housing Corp., 124 N.J.L. 73, 77, 11 A.2d 83 (E. & A., 1940)). "Unless such a conclusion can be derived, a third party has no cause of action despite the fact that it may derive an incidental benefit from the contract's performance." Id., 546 A.2d at 567 (citing to Gold Mills, Inc., 121 N.J. Super. at 373, 297 A.2d 203). Here, the clear contractual intent of the parties, as reflected by the express wording of paragraph 12 of the

General Provisions, is to benefit only the insured, Tri-State. The cases cited do not alter the conclusion that the Loss Payees are merely incidental beneficiaries of the insurance policy.

Nor does the status of Loss Payee on the endorsements issued by Great American to Tri-State afford Diebold, NCR and Palm Desert a direct right of action against Great American. Under New Jersey law, "[a] loss payee is not an insured but only 'a mere appointee [of the insured] who may not recover if the insured has breached any provision of the policy which would prevent recovery by him.' If the loss is not payable to the insured, it is not payable to the loss payee." Liberty Mutual Fire Ins. Co. v. Kahlaid, Inc., 199 N.J. Super. 494, 497, 489 A.2d 1231, 1232 (App. Div.), certif. denied, 101 N.J. 300, 501 A.2d 958 (1985) (quoting Donna Motor Lines, 46 N.J. at 447, 217 A.2d 617). See also Rena, Inc. v. Brien, 310 N.J. Super. 304, 317, 708 A.2d 747, 754 (App. Div. 1998); Martin v. Franklin Fire Ins. Co., 38 N.J.L. 140, *3 (Sup. Ct. 1875) (loss payee status is not an assignment but rather a direction for payment).

In Liberty Mutual, the seller of a supermarket took back a promissory note and a security interest in the inventory, and required that the seller maintain a casualty insurance policy naming the seller as the primary loss payee. The corporate purchaser complied. A year later, the sole shareholder of

the purchaser burned down the building and was convicted of arson. The casualty insurer contended that it was not required to pay the loss because of the arson. The seller claimed that as an innocent loss payee, it was entitled to be paid. Both the Law Division and the Appellate Division disagreed. The Appellate Division concluded:

> A casualty policy covering personal property subject to a security interest does not protect the secured creditor against a loss caused by the insured's wrongful act if the creditor is only a loss payee. To be protected against such a loss the secured creditor must be a co-insured.

199 N.J. Super. at 497. The Appellate Division also dismissed the seller's claim as an innocent third-party beneficiary, finding that there was "no evidence that plaintiff intended appellant to have any rights under the policy other than those of a loss payee. Plaintiff did not assume the risk of paying anyone if the insured intentionally caused the loss." Id. at 497-98, 489 a.2d at 1232.

As in Liberty Mutual, under the terms of the Loss Payee endorsement issued by Great American, there is no basis to conclude that the Loss Payees received co-insured status. The only benefit afforded to the Loss Payees was to have any proceeds awarded to Tri-State under the policy directed to them as joint payees. They were not afforded any additional rights or protections, and

their right to recover proceeds was derivative of the insured's right to recover under the policy. The Loss Payee endorsement explicitly provides that Great American did not assume the independent risk of coverage for each named Loss Payee.

3. Implied Contract.

In Count Four of the counterclaims, the Loss Payee Intervenors contend that Great American "had a duty to [the Loss Payees] to provide [them] with insurance benefits under the Policy", and "by its actions, implied that it had a contractual obligation to provide benefits under the Policy" to the loss payees.

In New Jersey, both implied-in-law and implied-in-fact contractual obligations are recognized. As to the former,

> Quasi-contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties. They "rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do."

St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co. of North America, 32 N.J. 17, 21, 158 A.2d 825, 827 (1960) (quoting 17 C.J.S. Contracts § 6 at 324). See

also Wanaque Borough Sewerage Auth. v. Township of West Milford, 144 N.J. 564, 574, 677 A.2d 747, 752 (1996). "In essence, a contract action implied-in-law is a restitutionary claim." Wanaque, 144 N.J. at 575, 677 A.2d at 752.

Under New Jersey law, an implied-in-fact contract "is in legal effect an express contract, and varies from the latter only insofar as the parties' agreement and assent thereto have been manifested by conduct instead of words." R.J. Longo Constr. Co. v. Transit America, Inc., 921 F. Supp. 1295, 1306 (D.N.J. 1996) (citations omitted). See also Wanaque, 144 N.J. at 574, 677 A.2d at 752. "Thus, where the parties' conduct or 'circumstances surrounding their relationship' support a finding of mutual agreement and intent to promise, a court will imbue the promise with the binding force of law." Id. (citations omitted).

Here, Great American's only relevant conduct toward the Loss Payees was to issue endorsements to Tri-State to make any payments due to Tri-State jointly payable to Tri-State and to the Loss Payees. There is no factual basis for the proposition that Great American enriched itself at the expense of the Loss Payee Intervenors, or that Great American owes restitution to the Loss Payees. No evidence of mutual agreement between Great American and the Loss Payees supports the imposition of an implied contract between the parties, with

corresponding duties and obligations.

4. Promissory Estoppel and Misrepresentation.

In the Second Count of the Loss Payee Intervenors' counterclaim, the Loss Payees assert a cause of action under the principle of promissory estoppel. They contend that Great American "affirmatively and directly represented" to them that they were protected under the policy as loss payees, and that Great American "made such representations intending that [the Loss Payees] would rely upon it or knowing that it was reasonably likely [the Loss Payees] would rely upon it." The Loss Payees claim that they relied, to their detriment, upon these representations, and have been damaged thereby.

To support a cause of action based on promissory estoppel under New Jersey law, the claimant must establish four elements:

> (1) a clear and definite promise by the promissor;
>
> (2) the promise must be made with the expectation that the promisee will rely thereon;
>
> (3) the promisee must in fact reasonably rely on the promise, and
>
> (4) detriment of a definite and substantial nature must be incurred in reliance on the promise.

Dluhos v. Strasberg, No. 00-CV-3163, 2001 WL 1720272, *9 (D.N.J. Aug. 31, 2001), aff'd in part, rev'd in part, 321 F.3d 365 (3d Cir. 2003). See also Automated Salvage Transport, Inc. v. NV Koninklijke KNP BT, 106 F. Supp.2d 606, 622 (D.N.J. 1999); Aircraft Inventory Corp. v. Falcon Jet Corp., 18 F. Supp.2d 409, 416 (D.N.J. 1998); Kress v. La Villa, 335 N.J. Super. 400, 762 A.2d 682 (App. Div.), certif. denied, 168 N.J. 289, 773 A.2d 1153 (2000); Pop's Cones, Inc. v. Resorts Int'l Hotel, Inc., 307 N.J. Super. 461, 469, 704 A.2d 1321, 1324 (App. Div. 1998). The promise must be "sufficiently clear and definite," and something more than an implied promise evidenced through the conduct of the parties. Automated Salvage, 106 F. Supp.2d at 622. "The essential justification for the promissory estoppel doctrine is to avoid the substantial hardship or injustice which would result if such a promise were not enforced." Pop's Cones, 307 N.J. Super. at 469, 704 A.2d at 1324.

On this record, there is no factual support to establish that Great American affirmatively and directly represented to the Loss Payees that they would be protected under the Tri-State policy regardless of Tri-State's entitlement to payment. There is no direct promise to enforce, and no basis for the application of promissory estoppel.

5. Equitable Estoppel.

As I reflected in my August 13, 2003 opinion, to establish a claim of equitable estoppel under New Jersey law,

> the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment.

Phillips v. Borough of Keyport, 107 F.3d 164, 182 (3d Cir.) (en banc), cert. denied, 522 U.S. 932, 118 S. Ct. 336, 139 L.Ed.2d 261 (1997) (quoting Miller v. Miller, 97 N.J. 154, 163, 478 A.2d 351, 355 (1984)). See also Scibek v. Longette, 339 N.J. Super. 72, 84, 770 A.2d 1242, 1250 (App. Div. 2001); The Tax Authority, Inc. v. Jackson Hewitt, Inc., 377 N.J. Super. 493, 512, 873 A.2d 616 (App. Div.), certif. granted, 185 N.J. 39, 878 A.2d 855 (2005). The reliance must also be in good faith. Phillips, 107 F.3d at 182. "[T]he essence of [the] doctrine is to prevent a party from disavowing its previous conduct where the conduct amounts to a concealment or misrepresentation of material fact, unknown to the party claiming estoppel, and where the conduct was motivated by the intention or expectation that it would be acted upon by the adverse party who does in fact rely thereon in good faith in prejudicially changing its position." Charter Oak Fire Ins. Co. v. State Farm Mutual Auto. Ins. Co., 344

N.J. Super. 408, 416-17, 782 A.2d 452, 458 (App. Div. 2001). Application of the doctrine should only be made in "'very compelling circumstances,' 'where the interests of justice, morality and common fairness clearly dictate that course.'" Phillips, 107 F.3d at 182 (quoting Palatine I v. Planning Bd. of Township of Montville, 133 N.J. 546, 560, 628 A.2d 321, 328 (1993).

The application of equitable estoppel against Great American to require the insurer to satisfy the Tri-State losses incurred by the Loss Payees must fail. There is no evidential support for the proposition that Great American actually knew, prior to the issuance of the insurance policies and the Loss Payee endorsements each year from 1997 through 2000, that employee theft of customer funds had occurred at Tri-State, that Tri-State made material misrepresentations on the insurance applications, or that Great American could seek rescission, or had a predisposition to seek rescission or deny coverage, when it issued the Loss Payee endorsements.

Alternatively, the facts developed at trial, which are undisturbed by these summary judgment motions, do not demonstrate that Great American's representations to the Loss Payees were made "under such circumstances that it was both natural and probable that it would induce action" on the part of the Loss Payees. Phillips, 107 F.3d at 182; Miller, 97 N.J. at 163, 478 A.2d at 355.

In New Jersey, equitable estoppel has been invoked when the facts demonstrate a direct and deliberate inducement by the estopped party of the other party to forego their rights. See, e.g., Miller, 97 N.J. at 163, 478 A.2d at 355; Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339, 403 A.2d 880, 883 (1979), and Charter Oak, 344 N.J. Super. at 416-17, 782 A.2d at 458. In Miller, a stepfather was estopped from disavowing responsibility for supporting his stepchildren where he actively interfered with the children's support from their natural parent, and induced reliance by the children on his financial support. In Carlsen, a union that accepted a worker's reinstatement fees and dues, paid solely to obtain pension benefits, and induced the worker to rely first on misinformation and then omission, was estopped from denying pension benefits to the worker. And in Charter Oaks, a secondary issuance carrier who induced the primary carrier to make a payment to settle litigation, without disclosing to the primary carrier its intention to seek recovery from the primary carrier, was estopped from achieving such a recovery.

Here, Great American cannot be charged with an act or omission which was designed to actively, directly and deliberately induce the Loss Payees to take action, i.e., to do business with Tri-State. The insurer simply represented to the Loss Payees that Tri-State had procured insurance coverage, and that if,

and to the extent that, insurance proceeds were payable to Tri-State, the proceeds would be jointly payable to Tri-State and to the Loss Payees. By issuing the endorsements and the certificates of insurance, Great American did not forego its potential defenses against providing coverage to Tri-State in the event of employee theft and disappearance of funds, including the possibility of contract rescission.

Diebold's reliance on the New Jersey Supreme Court case of Highway Trailer Co. v. Donna Motor Lines, 46 N.J. 442, 217 A.2d 617 (1966) to support the invocation of the doctrine is unavailing. Diebold is correct that under Donna Motor Lines, the benefits of an insurance contract may extend beyond the insured, to a loss payee. However, what is required is direct and deliberate action by the insurer, which induces the third party to act to their detriment, or "lulls" the party into inaction. In Donna Motor Lines, the court determined that an insurer may be estopped from denying coverage to a loss payee where the insurer, in numerous direct contacts with the loss payee after the loss occurred, led the loss payee to believe that all policy requirements had been met, and that settlement merely awaited the completion of the insurer's investigation. During its many contacts with the loss payee, the insurer failed to inform the loss payee that a formal proof of loss would be required to preserve the claim.

> Had [the loss payee] been aware that a proof of loss was not filed by [the insured] or that [the insurer] intended to demand the filing of such a document, it could have taken appropriate steps to protect its interests. In these circumstances [the insurer] should not be permitted to benefit from the very condition in the policy which [the insurer's] conduct led [the loss payee] to believe was already fulfilled or was of no significance to the ultimate settlement of the claim. We hold that where, as here, the insurer knows that the loss payee of a theft insurance policy has a vital interest in the claim and by its conduct leads the loss payee reasonably to believe that the claim has been adequately presented, thereby lulling the loss payee into inaction, the insurer is estopped from asserting any defect in the presentation of that claim.

Id. at 449, 217 A.2d at 621 (citations omitted). There is no factual basis presented here to conclude that Great American acted to "lull" the Loss Payees into inaction.

Neither public policy nor Great American's underwriting practices can serve here to give rise to an independent duty owed to the Loss Payees by Great American. It is well established in New Jersey that "duty is defined not by the contractual relationship between the parties [alone] but [also] by considerations of foreseeability and fairness." Carter Lincoln-Mercury, Inc., Leasing Div. v. Emar Group, Inc., 135 N.J. 182, 196, 638 A.2d 1288, 1295 (1994). In Carter Lincoln-Mercury, the New Jersey Supreme Court determined that an insurance broker owed a duty not only to the insured but also to loss payees, where the broker negligently failed to evaluate the financial stability of the insurer with

whom it placed coverage. Starting with the premise that "[t]he common law has long recognized that an insurance broker owes a duty to the insured to act with reasonable skill and diligence in performing the services of a broker," Id. at 188-89, 638 A.2d at 1291, the court concluded that the broker's obligation to the insured included an investigation of the financial security of the insurer. Id. at 192, 638 A.2d at 1292. In determining whether this duty extended to the loss payees, the court held that "[t]he question is one of fairness and policy that 'involves identifying, weighing, and balancing several factors -- the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.'" Id. at 194, 638 A.2d at 1294 (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439, 625 A.2d 1110 (1993)). As a result of "the foreseeable harm that may result if a carrier proves to be insolvent, and a broker's ability to protect against that harm," the court extended the duty of care to the loss payees. Id. at 200, 638 A.2d at 1296-97. See also Highlands Ins. Co. v. Hobbs Group, LLC, 373 F.3d 347 (3d Cir. 2004) (extending Carter to the surety context).

The Carter extension of a duty of care from an insurance broker to a loss payee, based on principles of foreseeable harm, does not apply here to extend a duty of care from the insurer to the Loss Payees. The duty owed by the insurance broker to its insured does not equate with the duty owed by an insurer to its insured. As noted in my opinion granting rescission of the

policies issued to Tri-State, in evaluating the duties between the insurer and the insured, the focus is on the duty of the prospective insured "to deal fairly with the insurer in the disclosure of facts material to the risk," In re Tri-State Armored Services, 332 B.R. at 716-17 (citing to First American Title Ins. Co. v. Lawson, 351 N.J. Super. 407, 421, 798 A.2d 661, 669 (App. Div. 2002), aff'd in part, rev'd in part, 177 N.J. 125, 827 A.2d 230 (2003)), rather than the duty of an insurer to act with reasonable skill and diligence in performing the services of an insurer. There is no support in New Jersey for the theory that an insurer's flawed underwriting procedures in issuing a policy gives rise to a duty to the insured that would preclude rescission of a policy if the insured misrepresented material information in the application. Id. at 726-27 (citation omitted). Therefore, unlike the duty of care owed by the broker to the insured, which was extended by the court to reach loss payees, there is no corollary duty of care under New Jersey law from the insurer to the insured which can be extended to the loss payees here.

I have determined that Great American did not know prior to the issuance of the insurance policies and Loss Payee endorsements that Tri-State had suffered losses and made material misrepresentations on its insurance applications. Great American did not know that it could and would seek rescission when it issued the insurance policies to Tri-State. Great American represented only that a policy was issued to Tri-State. To the extent that a

recovery for a reported loss was payable to Tri-State, the recovery would be jointly payable to the Loss Payees. Great American cannot be charged with the duty to account to the Loss Payees as a tortfeasor under these circumstances.

The considerations of public policy which served as the foundation in Carter for the extension of the broker's duty of care to the loss payees are replaced here by the "strong public policy [in New Jersey] against the proliferation of insurance fraud." Tri-State, 332 B.R. at 730 (citing Palisades Safety & Ins. Ass'n. v. Bastien, 175 N.J. 144, 151, 814 A.2d 619, 624 (2003)). It is readily acknowledged that the rejection of the claims of the Loss Payees defeats the reliance by the Loss Payees on the insurance coverage they were led to believe was in effect for the protection of their property. In my rescission opinion, I recognized that

> Great American affirmatively promoted to the cash handling industry its purported expertise in risk control and assessment, that Great American's underwriters were well aware that the purpose of Great American's policies was to protect third-party customers' property, and that these customers would not do business with armored car companies like Tri-State unless an insurer like Great American had assessed the risk and issued insurance protection for their funds. As well, Great American underwriters were aware that some state regulators required customer property to be insured as a matter of law.

Id. at 731. However, "Tri-State itself, the insured on the policy, forfeited its right to coverage by failing to disclose its losses over the years." Id. The forfeiture of rights by Tri-State extends to the forfeiture of the opportunity of

the Loss Payees to be compensated for their losses.

Summary judgment in favor of Great American and against the Loss Payees on all counts of their counterclaim against Great American, including equitable estoppel, is hereby granted. The cross-motions of the Loss Payees against Great American are denied. Great American shall submit an order.

Dated: March 21, 2006

JUDITH H. WIZMUR
CHIEF U.S. BANKRUPTCY JUDGE