

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

S.I. EXTENDED CONTRACTORS, INC.,)	
)	
Plaintiff/Appellant,)	Civil Case No. 01-CV-4035-JPG
)	
v.)	BK 98-41201
)	
TRAVELERS CASUALTY AND SURETY)	
COMPANY,)	
)	
Defendant/Appellee.)	

ORDER

GILBERT, District Judge:

This is an appeal by Debtor S.I. Extended Contractors, Inc. ("SIE") from United States Bankruptcy Judge Gerald D. Fines' November 9, 2000, order denying its objections to the proof of claim filed against it by Creditor Travelers Casualty and Surety Company ("Travelers")¹ and his December 18, 2000, order denying its reconsideration motion. For the following reasons, this Court affirms both decisions.

I. BACKGROUND²

On December 6, 1993, SIE submitted an application for insurance to the Illinois Assigned Risk Insurance Plan³ which was signed by then-president of SIE, David Odom (Bankr. Doc. 92, Mr. Odom

¹Travelers was formerly known as Aetna Casualty and Surety Company.

²This Court has labeled the documents filed before the Bankruptcy Court with the prefix "Bankr. Doc." and the documents filed before this Court on appeal with the prefix "Doc."

³An employer can get basic workers' compensation insurance coverage under the Assigned Risk Plan when an employer's request for coverage is declined by two insurers. See 50 Ill. Adm. Code § 2904.50, *et seq.*

represented that SIE was a new business which planned to lease employees to various employers in Missouri and Illinois (Bankr. Doc. 92, Ex. 1 (A)). This representation was not altogether accurate, inasmuch as 75 % of SIE's clients were formerly clients of MOAR, the president of MOAR was Mr. Odom, and the other principals of MOAR also went to work for SIE (Bankr. Doc. 93, Ex. 19, at p. 6). This is relevant because the fact that SIE was "virtually identical" to the previous MOAR corporation meant that, for purposes of workers' compensation insurance, SIE retained the same "experience modification factor"⁴ as MOAR, which had the effect of increasing the amount of premiums required under its workers' compensation policy (Bankr. Doc. 93, Ex. 19; Bankr. Doc. 116, at pp. 4-5). Allegedly, Mr. Odom rolled over SIE into the new entity of Labor Specialists to avoid premium payments just as he did when he rolled over MOAR into SIE, but that is really not at issue here (Bankr. Doc. 30, at ¶¶ 18-20).

After having been designated as the servicing carrier, Travelers issued SIE worker's compensation insurance policy #08C23247399CAA, which covered the period of time from December 7, 1993, to December 7, 1994 (Doc. 92, Ex. 1). At SIE's request, Travelers extended coverage under this policy from December 7, 1994, through December 31, 1994 under policy number #08C24103954CAA (Bankr. Doc.

⁴One of the factors used in determining the amount of premiums for a workers' compensation insurance policy is the "experience modification factor" of the company. New companies generally receive an experience modification factor of 1 when being issued a new workers' compensation insurance policy. However, those companies that are not new or have had prior coverage under workers' compensation insurance may, and often are, assigned an experience modification factor that is higher than 1, which, when multiplied by premiums due, increases the amount of premiums required under a given workers' compensation insurance policy. MOAR had an experience modification factor higher than 1, which was assigned to SIE because the operations of the two companies were, as the hearing officer put it, "virtually identical" (Bankr. Doc. 93, Ex. 19, at p. 6).

116, at p. 3; Bankr. Doc. 65, Ex. B1).

Prior to the expiration of SIE's insurance policies, Travelers requested permission from the Illinois Department of Insurance to apply the experience modifier developed by MOAR to SIE's policies which was granted.

After the expiration of the policy, Travelers made numerous attempts to conduct a final audit of SIE's operations (Doc. 4, at pp. 4-6). However, SIE, through its president, Mr. Odom, continually delayed the audit and eventually refused to permit an audit in violation of the terms in the policies that gave Travelers the right to conduct such audits (Doc. 4, at pp. 4-6).

On April 10, 1998, Travelers filed a Complaint against MOAR Contract Services, Inc. ("MOAR"), SIE and Labor Specialists, Inc., advancing various legal theories of recovery against SIE, including breach of contract, request for an accounting, and alter ego theories (Bankr. Doc. 92, Ex. 1). In response, MOAR and SIE filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on July 6, 1998. Travelers timely filed its Proof of Claim with the bankruptcy court on May 14, 1999. On July 12, 1999, SIE filed objections to Travelers' claim, raising only the following objections:

1. That said Claim is based on a [worker's compensation insurance] contract entered into between SIE Extended Contractors, Inc. and Aetna Casualty and Surety Company.
2. That SIE Extended Contractors, Inc. did not enter into a contract with Travelers Casualty and Surety Company.
3. That further Aetna Insurance Company did not conduct an audit within three years of the termination date of the policy and said audit is [a] requirement to calculating the final premium.

(Bankr. Doc. 92, Ex. 4).

On October 16, 2000, Bankruptcy Judge Fines conducted a trial on SIE's objections to Travelers' claim. At trial, SIE withdrew its first two objections because Aetna and Travelers had merged (Bankr. Doc. 92, Ex. 6; Trial Tr., at p. 7; Bankr. Doc. 116, at pp. 1-2). Trial was therefore held on SIE's remaining objection that Travelers did not conduct an audit within three years of the termination of SIE's insurance policy. After orally ruling in Travelers' favor, Bankruptcy Judge Fines issued his written findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 on November 9, 2000, in which he found that Travelers' claim against SIE was valid (Bankr. Doc. 116). On November 20, 2000, SIE moved for reconsideration (Bankr. Doc. 120). Bankruptcy Judge Fines denied the motion on December 18, 2000 (Bankr. Doc. 126). SIE timely appealed both Bankruptcy Judge Fines' November 9, 2000, and December 18, 2000, decisions.⁵

II. STANDARD OF REVIEW

In an appeal from a bankruptcy court's decision, a dual standard applies. First, questions of law are reviewed *de novo*. Second, the bankruptcy court's findings of fact "shall not be set aside unless clearly

⁵Normally, a notice of appeal would have had to have been filed within 10 days after an order, judgment or decree. In that 10-day period, the day on which the order was entered does not count, but intermediate weekends do. Bankr. R. 8002(b). If the Notice of Appeal is due on a Saturday, Sunday or legal holiday, the Notice of Appeal will be due on the preceding day that is not one of the days mentioned above. Bankr. R. 8002(b). The tenth day was November 19, 2000, but, because that day is a Saturday, the Notice of Appeal was due by November 20, 2000. Instead of filing a Notice of Appeal on November 20, 2000, SIE filed a timely motion for reconsideration, a new trial, and amendment or relief from judgment (Bankr. Doc. 119). Because SIE timely filed this motion, the appeal time is measured from the date on which this motion was disposed of by the bankruptcy court. Bankr. R. 8002(b). Because the bankruptcy court denied this motion by oral order on December 18, 2000, SIE had until December 28, 2000, to file a Notice of Appeal. Therefore, SIE's Notice of Appeal of the bankruptcy court's November 9, 2000, and December 18, 2000, Orders docketed on December 28, 2000, is properly before this Court.

erroneous." Bankr. R. 8013. See *Matter of A-1 Paving and Contracting, Inc.*, 116 F.3d 242, 243 (7th Cir. 1997) (noting that "the bankruptcy court's findings of fact are upheld unless clearly erroneous"). The rules command that "due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Bankr. R. 8013. Thus, if the bankruptcy court's "account of the evidence is plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced that it would have weighed the evidence differently as trier of fact." *Great Southern Co. v. Allard*, 202 B.R. 938, 944 (N.D. Ill. 1996). The Seventh Circuit has commented generally on the proper type of appellate review of a trial court's factual determinations: "We will not reverse [a trial judge's] determination unless it strikes us as wrong with the force of a 5-week-old, unrefrigerated, dead fish." *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1108 (7th Cir. 2000).

III. ISSUES ON APPEAL

SIE argues that Bankruptcy Judge Fines committed six reversible errors. This Court will address each in turn.

A. Three-Year Period In Which To Perform An Audit

SIE first argues that Bankruptcy Judge Fines committed reversible error in determining that certain terms of the insurance policy at issue were unambiguous and did not constitute a statute of limitations. The relevant contract terms are as follows. Part Five, Section E of the policy provides in relevant part:

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you,

The final premium will not be less than the highest minimum premium for the classifications by this policy....

(Bankr. Doc. 92, Ex. 1(C)). Part Five, Section G of the policy provides in relevant part:

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

(Bankr. Doc. 92, Ex. 1(C)). After arguing that, under section E, the final premium "will be determined after this policy ends by using the actual, not the estimated, premium basis," SIE argues that the language, "We may conduct the audits . . . within three years after the policy period ends" in Section G acts as a bar to any audit conducted more than three years after the policy period ends.

Travelers responds, arguing that Bankruptcy Judge Fines was entirely correct to find no ambiguities hidden within the policy language. Travelers notes that the first two sentences of section G simply afford it significantly broad inspection rights. Travelers also notes that the third sentence simply states that it "may" conduct the audits within three years after the policy period ends, not "must." Travelers' position is that when the words of section G are given their plain meaning, it is unambiguous that the third sentence fails

to create a statute of limitation.⁶

Because SIE's argument requires this Court to interpret language in the insurance policy, this Court will briefly review the general standards for interpreting contracts. Whether a contract is ambiguous is first a question of law. *See Quake Constr., Inc. v. American Airlines, Inc.*, 565 N.E.2d 990, 994 (Ill. 1990); *Arrow Master, Inc. v. Unique Forming Ltd.*, 12 F.3d 709, 713 (7th Cir. 1993). A court must construe the words of a contract in accordance with their "usual, common and ordinary meaning." *CSFM Corp. v. Elbert & McKee Co.*, 870 F.Supp. 841, 849 (N.D. Ill. 1994). If a term is capable of more than one interpretation, then the term is ambiguous and the interpretation of its meaning is a question of fact which, if it is material, must go to the trier of fact. *See Quake Constr.*, 565 N.E.2d at 994. However, if the contract language is unambiguous, courts may not resort to other means of interpretation and must, as a matter of law, give the terms their common and generally accepted meaning. *See Metalex Corp. v. Uniden Corp. of America*, 863 F.2d 1331, 1333 (7th Cir. 1988); *Coral Chemical Co. v. Mivamax Technologies Corp.*, 1997 WL 695660, at *3 (N.D. Ill. 1997).

This Court finds that Bankruptcy Judge Fines was correct in determining that the insurance policy terms at issue were unambiguous and did not constitute a statute of limitations. When the entire policy is considered, it is clear that SIE is required to keep records and permit a final audit, while Travelers has the right to audit SIE's records. Also, the use of the word "may" regarding Travelers' right to conduct an audit negates SIE's assertion that Part 5, Section G of the policy constitutes some statute of limitation. If anything,

⁶Travelers also notes Part Five, section F, in which the policy reads: "You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them." Travelers argues that its request for copies of records were rebuffed in violation of this clear policy language.

it suggests that Travelers has a "right" to audit, creating a corresponding duty on the part of SIE to allow an audit. The fact that some insureds (perhaps only the ones attempting to avoid paying any premiums) claim to misunderstand the plain meaning of certain language does not operate to magically transform unambiguous words into ambiguous ones. Instead, it is those individuals who would have failed to properly afford the language its plain meaning. There is no other language in the policy limiting Travelers' right to pursue a legal remedy for what Bankruptcy Judge Fines determined was SIE's breach of their own obligations under the policy to allow Travelers to conduct an audit. This Court therefore rejects this argument.

B. Basis For Final Audit

SIE next tries to seize on the fact that no actual physical audit was conducted. SIE argues that an actual physical audit is a precondition to Travelers collecting the final premium due. SIE attempts to support its argument stressing the second sentence of Part 5, Section E:

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. *The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy.* If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications by this policy.

(Bankr. Doc. 92, Ex. 1(C) (emphasis added)). SIE's position is that it has no obligation to pay the final premium because the final premium was not determined as a result of an actual physical audit.

Travelers responds, arguing that it cannot be faulted for not conducting an actual physical audit because it was SIE that prevented it from doing so. Travelers argues that SIE cannot avoid its obligation

to render the final premium by making it impossible for Travelers to perform its duty to conduct an actual physical audit. Because SIE prevented Travelers from performing this "actual physical audit" condition of the contract, SIE cannot take advantage of this conduct to claim that Travelers' resulting failure to satisfy this condition relieves it of its obligations under the contract to render a final premium. Faced with such a situation, Travelers argues, it based its audit on "other premium basis" which was the only other appropriate way to conduct an audit, under the circumstances of this case, in compliance with 50 Ill. Admin. Code § 2904.120, the regulation that governs final premium audits. Therefore, Travelers argues that its failure to conduct an actual physical audit pursuant to the contract should not excuse SIE's contractual obligation to pay the final premium.

There is a lot of support for Travelers' position. The Seventh Circuit has remarked: "It is basic contract law that a party who prevents the occurrence of a condition precedent may not stand on that condition's non-occurrence to refuse to perform his part of the contract." *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 542 (7th Cir. 1996).⁷ Calculation of the final premium

⁷This is hardly a novel concept in contract law. See *O'Nel v. Continental Ill. Nat'l Bank and Trust Co. of Chicago*, 1985 WL 2710, *7 (N.D. Ill. Sep. 25, 1985); *Cummings v. Beaton & Associates, Inc.*, 618 N.E.2d 292, 306 (Ill. App. Ct. 1992); *Wasserman v. Autohaus on Edens, Inc.*, 559 N.E.2d 911, 918 (Ill. App. Ct. 1990); *Oakleaf of Illinois v. Oakleaf & Associates, Inc.*, 527 N.E.2d 926, 933 (Ill. App. Ct. 1988); *Lukasik v. Riddell, Inc.*, 452 N.E.2d 55, 59 (Ill. App. Ct. 1983); *Mineral Resources, Inc. v. Classic Coal Corp.*, 450 N.E.2d 379, 384 (Ill. App. Ct. 1983); *Osten v. Shah*, 433 N.E.2d 294, 296 (Ill. App. Ct. 1982); *Barrows v. Maco, Inc.*, 419 N.E.2d 634, 639 (Ill. App. Ct. 1981); *Chicago Title and Trust Co. v. Hedges Mfg. Co., Inc.*, 414 N.E.2d 232, 237 (Ill. App. Ct. 1980); *Olsen v. Scholl*, 347 N.E.2d 195, 197 (Ill. App. Ct. 1976); *John Kubinski & Sons, Inc. v. Dockside Development Corp.*, 339 N.E.2d 529, 534 (Ill. App. Ct. 1975); *Gamm Const. Co. v. Townsend*, 336 N.E.2d 592, 594 (Ill. App. Ct. 1975); *Yale Development Co., Inc. v. Oak Park Trust & Sav. Bank*, 325 N.E.2d 418, 422 (Ill. App. Ct. 1975); *Ehard v. Pistakee Builders, Inc.*, 250 N.E.2d 1, 4 (Ill. App. Ct. 1969); *Eggan v. Simonds*, 181 N.E.2d 354, 356 (Ill. App. Ct. 1962); *Levy v. American Auto. Ins. Co.*, 175 N.E.2d 607, 610-11 (Ill. App. Ct. 1961).

appears to require, according to the contract, an actual physical audit. It is SIE's position that a condition precedent to Travelers being able to collect the final premium is the performance of an actual physical audit. To ensure its access to SIE's records, Travelers bargained for and received from SIE the right to have access to those books on demand (Bankr. Doc. 92, Ex. 1, Part 5, Section F). Even assuming that a condition precedent to Travelers' collection of the final premium was the performance of an actual physical audit, it was Mr. Odom himself who prevented the occurrence of the condition precedent (*i.e.*, Travelers' ability to conduct an actual physical audit). So SIE cannot now argue that the condition's non-occurrence (*i.e.*, Travelers' failure to conduct an actual physical audit) provides it with an adequate basis to refuse to perform its part of the contract (*i.e.*, paying the final premium). Bankruptcy Judge Fines found that SIE ignobly breached its duty to provide Travelers access to its records and stated that SIE could not now complain about Travelers' obligations under the contract that SIE itself prevented Travelers from performing (Bankr. Doc. 116, at p. 10). Bankruptcy Judge Fines made no clearly erroneous findings of fact in this regard, and his conclusions of law were entirely correct.

Prevented from conducting an actual physical audit by SIE, Travelers conducted the final premium audit based on "other premium basis" as allowed by 50 Ill. Admin. Code § 2904.120. After hearing all the evidence, Bankruptcy Judge Fines noted, "Travelers used its best efforts and information to derive the amount of its claim [and] that the premium amount claimed by Travelers in its proof of claim is not based on an estimation, but rather is based on investigation of record available through entities which leased employees from the Debtor Corporation" (Bankr. Doc. 116, at p. 10). This Court finds that Bankruptcy Judge Fines made no clearly erroneous findings of fact in this regard. There was also nothing wrong with

Travelers using a regulatorily-approved alternative method of calculating the final premium (*i.e.*, "other premium basis") in this case, especially where Mr. Odom prevented Travelers from accessing the documents that were needed for an actual physical audit.

SIE has three remaining arguments of which this Court can quickly dispose. First, SIE argues that only actual physical audits are allowed under 50 Ill. Admin. Code § 2904.120, which provides that "[f]inal earned premium for any policy issued under the requirements of this Part shall be determined on actual, instead of estimated, payroll or *other premium basis*." This assertion is wrong because if §2904.120 only allowed for final premiums to be determined on actual payroll (as opposed to estimated payroll), there would have been no reason to insert the "other premium basis" language into § 2904.120. This language was inserted for a reason and provides an adequate basis for determining the final premium due under the particular circumstances of this case.

Second, the parties quibble over whether Travelers' employees' testimony concerned one audit or two. SIE argues that Mr. Kupec's testimony indicating that, in April 1995, Travelers employee Diane Strzelecki advised him that she had "estimated" both the full year and short term policies by simply "increas[ing] the estimate by 25% which was an "arbitrary" percentage. Thinking that this testimony concerned the final premium audit, SIE argued that final premium audits based on arbitrary increases cannot constitute proper final audits. Travelers responds, arguing that there was actually two audits involved: (1) an April 1995 estimated audit conducted by Ms. Strzelecki which increased the original estimate by an arbitrary 25 % to encourage SIE to cooperate but which was not the basis of the final premiums sought by Travelers, and (2) a June 15, 1995, final audit based on Mr. Kupec's extensive investigation (Trial Tr., at pp. 126-27). This Court finds that SIE has not shown that these "estimate" comments relate to anything

other than the April 1995 audit which was not the basis of the final premiums sought by Travelers. SIE has therefore not shown that Bankruptcy Judge Fines was compelled to find that these comments related to the June 15, 1995, final audit, and this argument is rejected.⁸

Finally, SIE questions the accuracy of Travelers' claim. Interestingly, SIE challenges the accuracy of Travelers' claim on the ground that Travelers' did not submit supporting documentation for its assessment. Interestingly, the supporting documentation on which SIE would have liked the claim to have been based is documentation that SIE itself improperly withheld from Travelers in clear violation on the contract. Here, Bankruptcy Judge Fines, as the finder of fact, was within his discretion to rely on the testimony of Mr. Kupec to determine the accuracy of the final premium, and this Court finds no clear error in Bankruptcy Judge Fines' findings of fact in this regard. In fact, Bankruptcy Judge Fines has repeatedly made it clear that he found Mr. Kupec to be a credible witness and found Mr. Odom to be a liar. This argument is rejected.

C. **Experience Modification Factor**

SIE next argues that Bankruptcy Judge Fines committed clear error in determining that "the application of the experience modification factor of MOAR to the Debtor Corporation [was] not an issue in this proceeding" (Doc. 3, at p. 20). SIE maintains that Bankruptcy Judge Fines wrongly concluded that the experience modifier issue was really not an issue at the trial on SIE's objections to Travelers' claim. Convinced that it informed Bankruptcy Judge Fines that this was a real issue at trial, SIE argues that the April 17, 1996, Illinois Department of Insurance decision to permit Travelers to adjust the experience

⁸This Court believes that SIE has been taking improper liberties with interpreting the testimony of Mr. Kupec (Doc. 3, at p. 19; Doc. 4, at pp. 14-17).

modifier did not allow Travelers to apply the experience modifier factor pre-decision.

Travelers responds, pointing out that SIE never filed a written objection even relating to the experience modifier issue. Travelers further points out that it was SIE itself that stated the experience modifier issue was not an issue at the trial on SIE's objections to Travelers' claim. In support, Travelers cites the opening statement by counsel for SIE:

During this time, another issue arises, and it's this experience modifier, Judge. And what happened here was that *Travelers was trying or did, in fact, apply a modifier to the premium of the policy*. What they did was they tried to combine and did, in fact, combine the experience ratings for a previous company, to which Mr. Odom was an employee - *that's really not an issue here* - that went before the Illinois Department of Insurance there was a final adjudication on that; and the experience modifier was - the number was determined.

(Bankr. Doc. 92, at pp. 16-17 (emphasis added)). Travelers argues that Bankruptcy Judge Fines was not wrong to rely on SIE's own representation that the way Travelers applied the experience modifier to the policy was no longer an issue at trial.

SIE replies, citing additional tidbits from Bankruptcy Documents 15 and 21 for support. Unfortunately, those documents were not included in the record on appeal and, thus, will not be considered by this Court. *Cf. Carter v. American Oil Co.*, 139 F.3d 1158, 1163 (7th Cir. 1998) (reviewing court is not obligated to assume the truth of a party's conclusory allegations on faith or to scour the record to unearth facts supporting the alleging party's version of events).⁹

⁹To review a bankruptcy court's findings, a district court must have before it the relevant transcripts and all other relevant evidence considered by the bankruptcy court. 10 Collier on Bankruptcy ¶ 8006.08[2] (15th ed., Lawrence P. King ed., 2001). It is the appellant's burden to provide this Court a sufficient record on appeal to determine the issues he raises. *Id.* at ¶ 8006.03[1]; see *In re Sunset Sales, Inc.*, 220 B.R. 1005, 1015 (Bankr. 10th Cir. 1998), *affd*, 195 F.3d 568 (10th

This Court finds that Bankruptcy Judge Fines did not commit clear error in determining that "the application of the experience modification factor of MOAR to the Debtor Corporation [was] not an issue in this proceeding" (Doc. 3, at p. 20). In fact, the record indicates that he was entirely correct.

At the outset, this Court notes that there is no indication that SIE filed a written objection that contained an objection based on any experience modifier issue. SIE failed to attempt to cite evidence in the appellate record supporting its assertion as to when it purportedly made a proper objection based on Travelers' application of the experience modifier, and this Court will not scour the record where SIE failed to direct this Court to any citations to the record. While there is an indication that SIE raised an argument in its trial brief on the experience modifier issue, it was SIE itself who later represented to the Court that, while Travelers "appli[ied] a modifier to the premium of the policy: that was "really not an issue here." (Doc 92, at pp. 17). No matter how qualified SIE thinks its "that's not really an issue here" statement was, the only reasonable interpretation of this statement is that SIE represented to Bankruptcy Judge Fines that Travelers' application of the experience modifier factor was not longer really a contested issue at trial. Therefore, as did Bankruptcy Judge Fines, this Court holds SIE to its attorney's word. *See Miller v. Willow Creek Homes, Inc.*, –F.3d–, 2001 WL 476193, at *2 (7th Cir. May 1, 2001) ("The [appellants] would have us ignore the clear statements of their intent announced by their attorney in open court.")

Even if this Court believed that SIE's experience modifier issue was properly before Bankruptcy

Cir. 1999); *In re Massoud*, 248 B.R. 160, 163 (Bankr. 9th Cir. 2000); *In re R.D.F. Developments, Inc.*, 239 B.R. 336, 339-40 (Bankr. 6th Cir. 1999). "Unless the record that is brought before the appellate court affirmatively shows the occurrence of the matters upon which the appellant relies for relief, the appellant may not urge those matters on appeal." 10 Lawrence King, *Collier on Bankruptcy* ¶ 8006.03[1]; *see, e.g., In re Schnabel*, 612 F.2d 315, 318 (7th Cir. 1980). This Court will therefore not consider SIE's assertions on faith. *Cf. Carter*, 139 F.3d at 1163.

Judge Fines - which it was not - this Court would nonetheless reject SIE's attempts to read a restriction into the contract where there is none.

The relevant section reads:

Experience rating is mandatory for all eligible insured. The experience rating modification factor, if any, applicable to this policy, may change if there is a change in your ownership or in that of one or more of the entities eligible to be continued with you for experience rating purposes. Change in ownership includes sales, purchases, other transfers, mergers, consolidations, dissolution, formations of a new entity and other changes provided for in the applicable experience rating manual.

You must report any change in ownership to us in writing within 90 days of such change. Failure to report such changes within this period may result in revision of the experience rating modification factor used to determine your premium.

(Bank. Doc. 102, Ex. 1, at p. 68). SIE argues that a restriction exists in this language, forbidding the retroactive application of an experience modifier absent express language in the Illinois Department of Insurance's ruling specifically allowing Travelers to apply the experience modification factor retroactively. Travelers responds, arguing that such an argument would be tantamount to saying that a jury verdict could not be collected unless the jury expressly authorizes that the verdict is collectable.

SIE has not shown that retroactive application is forbidden, and the Illinois Department of Insurance's ruling clearly held that SIE never originally met the requirements to establish a new experience modifier rating (Bank. Doc. 93, E's. 19, 20). Specifically, the Illinois Department of Insurance held that the experience modifier rating that MOAR had followed to SIE's policy. The Illinois Department of Insurance knew that, at the time it rendered its April 17, 1996, decision, SIE had ceased its operations on January 1, 1995, and was out of business (Doc. 93, Ex. 19, at ¶¶ 140, (j, k)). Without doubt, the only reasonable interpretation of the April 17, 1996, ruling by the Illinois Department of Insurance was that the

experience modifier was to be applied retroactively. Reading a "prospective application only" limitation on the ruling is patently unreasonable as SIE was no longer in business and its policies had already expired.¹⁰ Therefore, the only way to give effect to the Illinois Department of Insurance decision would be to apply it retroactively.

Simply put, SIE has not shown that Bankruptcy Judge Fines committed clear error in determining that any experience modifier issue was not at issue being advanced at the trial on SIE's objections to Travelers' claim; thus, this Court will not take the first stab at it on appellate review. *See In re Rather*, 132 BR. 728, 732 (N.D. Ill. 1991) (Williams, J.). In any event, SIE has not shown that the contractual language bars retroactive application under the particular circumstances of this case or that the Illinois Department of Insurance's decision had a "prospective application only" limitation hidden within the ruling.

D. Laches

SIE next argues that Bankruptcy Judge Fines committed reversible error by failing to apply laches in this case to bar Travelers' claim.

"The equitable doctrine of laches is derived from the maxim that those who sleep on their rights, lose them." *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d. 813, 820 (7th Cir. 1999). Laches is simply "a neglect or omission to assert a right, taken in conjunction with a lapse of time of more or less duration, and other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity." *Meyers v. Kissner*, 594 N.E.2d 336 (Ill. 1992). Put another way, for laches to apply in a particular case, "the party

¹⁰The Illinois Department of Insurance's decision in question was issued on April 17, 1996, and SIE no longer had a policy after December 31, 1994. SIE's interpretation would render the entire decision meaningless.

asserting the defense must demonstrate: (1) an unreasonable lack of diligence by the party against whom the defense is asserted and (2) prejudice arising therefrom." *Hot Wax*, 191 F. 3d at 820. As an equitable defense, laches cannot be used unless the party asserting laches has "acted fairly and without fraud or deceit as to the controversy in issue." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945). See *Packers Trading Co. v. Commodity Futures Trading Come*, 972 F.2d 144, 148-49 (7th Cir. 1992). A deferential standard applies to a trial court's determination not to apply laches. See *Cook v. City of Chicago*, 192 F.3d 693, 697 (7th Cir. 1999).¹¹

SIE had originally (1) argued that it was approaching the bankruptcy court with "clean hands"; (2) pondered whether "Mr. Odom's conduct [was] more egregious than that of the insurance company"; and (3) argued that Travelers knew that it had the ability to file a suit to compel production of SIE's documents within three years of the policy's end (Bank. Doc. 109, at pp. 11-12). In short, SIE's argument is that because Travelers did not exercise its right to access SIE's documents within three years, it forfeited its right to collect the final premium which should be based on an audit of those physical documents.

¹¹This Court notes that, while the parties cite both Illinois and federal cases, they also both fail to address whether Illinois laches law or the federal common law on laches controls. The Seventh Circuit has held that "[the applicability of the doctrine of laches to actions in federal courts based on federally created causes of action is a matter of federal and not state law," *Baker v. F & F Inv.*, 420 F.2d 1191, 1193 n.3 (7th Cir. 1970), and has also noted, in a Langham Act case, that "state law does affect a federal court's determination of whether laches applies," *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999). This is not a case involving a federally-created cause of action. Because Illinois contract law controls the interpretation of the contract in this case, Illinois law as to contractual defenses such as laches also applies. *Buckler v. Kaye*, 222 F.2d 216, 219 (10th Cir. 1955) ("Oklahoma substantive law controls this case. And, this is also true of the defenses of laches and limitation.") (footnotes omitted). In any event, the parties fail to articulate any meaningful distinction between Illinois laches law and Seventh Circuit laches law. As such, any distinction is really not germane to the issue whether Bankruptcy Judge Fines was required to apply laches in this case.

Travelers responds, arguing that SIE walked to the bankruptcy court with dirty hands, and only those with unclean hands can properly obtain equitable relief. Travelers notes the bankruptcy court's repeated references to Mr. Odom's less-than-credible testimony as well as SIE's admitted refusal to comply with contract terms that required SIE (with or without a coercive injunction) to turn over various documents so that Travelers could do an actual physical audit. Travelers further argues, "The fact that [SIE] took an allegedly 'very public stances' regarding its unclean hands (*i.e.*, its open refusal to permit an audit), does not make [SIE's] hands any cleaner" (Doc. 4, at p. 20). In short, Travelers argues that SIE should not profit from its wrongdoing by arguing that Travelers' failure to conduct an actual physical audit prevents Travelers from collecting the final premium, especially where it was SIE that deliberately breached the contract by refusing to permit an actual physical audit.

At the onset, this Court notes that Bankruptcy Judge Fines could have been a bit more clear on the reasoning why he implicitly rejected SIE's laches argument (Bank. Doc. 116; Trans. Hearing on SIE's Reconsideration Motion, at pp. 8-10). Nevertheless, the apparent reason was because SIE did not approach the bankruptcy court with clean hands. The bankruptcy court repeatedly lectured about Mr. Odom's untruthfulness, stating that Mr. Odom was -- to put it bluntly -- lying about where the audit documents went, whether the audit documents were actually destroyed in a fire, whether they were indeed stolen along with a briefcase, etc. Trial Trans. at pp. 231-33; Doc. 116, at pp. 6-8). The bankruptcy court also reasoned:

The Court further concludes that it was clear, under the policy in question, that [SIE] had a duty, under Section G, Part Five, entitled "Audit," to allow Travelers to examine and audit all records that relate to the policy. The credible evidence before the Court in this matter clearly indicates that [SIE] breached this duty,

and that, as a result, cannot now complain of the amount of the final premium, which was determined by Travelers through a reasonable investigation and examination of records and documents from sources other than [SIE].

(Doc. 116, at p. 10).

Reviewing courts may vacate and remand if the trial court's findings insufficiently alert the reviewing court of the reasons for the decision. *See Hatahley v. United States*, 351 U.S. 173, 182 (1956). However, in this case, a remand to make this extremely apparent reason explicit would be a waste of time; this was obviously the bankruptcy court's reason for not applying the laches doctrine. *See Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.*, 119 F. 3d 393, 400 (6th Cir. 1997) (failure of a trial court to comply with Rule 52(a) in respect of findings does not demand reversal if a full understanding of the issues could be reached without the aid of additional findings even though such findings would have been helpful); Bank. R. 7052 (bankruptcy court's findings governed by Fed. R. Civ. P. 52).

That said, this Court finds that the bankruptcy court did not abuse its discretion in not applying the laches doctrine. SIE's hands were very dirty, as Bankruptcy Judge Fines had noted. The bankruptcy court did not abuse its discretion in refusing to allow SIE to profit from its wrongdoing. Travelers' failure to conduct an actual physical audit did not prevent it from collecting a premium where SIE was the one who deliberately breached the contract by refusing to permit an actual physical audit. SIE's intimations that Travelers should have earlier filed a suit for specific performance to compel SIE to comply with obligations that were already due under the contract rings hollow and does not show that SIE's deliberate stonewalling efforts were any less deliberate. Travelers already attempted to assert its rights; however, its attempts were

all rebuffed by SIE. This argument is therefore rejected.

E. **Reconsideration Motion**

Finally, SIE claims that Bankruptcy Judge Fines committed reversible error in his December 18, 2000, order denying reconsideration because he did not revisit his November 9, 2000, opinion in light of the purported "newly discovered evidence" advanced by SIE. SIE points out that, in his November 9, 2000, order, Bankruptcy Judge Fines noted that the April 17, 1996, decision by the Illinois Department of Insurance with respect to Travelers' application of the experience modifier factor "was not appealed further" (Doc. 3, at p. 23). However, after the November 9, 2000, decision, SIE claimed it discovered that it had actually appealed that decision and claimed that, before the trial on SIE's objections to Travelers' claim, both parties had assumed that SIE had not appealed.

Travelers responds, arguing that, even if this fact is material, it is not "newly discovered evidence" that could form the proper basis for a reconsideration motion. Travelers first notes that it was not a party to the appeal. Travelers then argues that SIE's unexplained unawareness of its own actions cannot constitute "newly discovered evidence."

The standard of review for denying reconsideration motions is abuse of discretion, *In re Rather*, 132 BR. 728, and there is no indication that Bankruptcy Judge Fines abused his discretion in denying SIE's reconsideration motion.¹² Reconsideration motions are not the proper vehicle to introduce evidence that could have been presented earlier. Here, SIE presented no compelling excuse as to why it could not have discovered that it filed an appeal prior to trial. Because there is absolutely no compelling reason why this

¹²SIE appears to have abandoned this ground in its reply brief.

evidence could not have been presented earlier, Bankruptcy Judge Fines did not abuse his discretion in rejecting this evidence as a proper basis on which to reconsider his earlier ruling.¹³

IV. CONCLUSION

For these reasons, the bankruptcy court orders of November 9, 2000, and December 18, 2000, are **AFFIRMED**. The Clerk is **DIRECTED** to enter judgment accordingly.

IT IS SO ORDERED.

DATED: May 15, 2001.

/s/ J. PHIL GILBERT
U.S. District Judge

¹³To the extent that SIE raises new appellate issues in its reply brief, these are rejected. *See Aliwoli v. Gilmore*, 127 F.3d 632, 635 (7th Cir.1997) (arguments presented for the first time in a reply brief are waived); *Kauthar SDN BHD v. Sternberg*, 149 F. 3 d 65 9, 668 (7th Cir. 1998) (same).