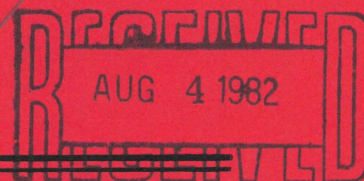


22TVa 407

CLERK  
SUPREME COURT OF VIRGINIA



RICHMOND, VIRGINIA

IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

RECORD NO. 811391

*ST. PAUL FIRE & MARINE INSURANCE COMPANY*

Appellant,

v.

*S. L. NUSBAUM & COMPANY, INC.,*

Appellee.

APPENDIX

*James C. Howell*  
*WILLCOX, SAVAGE, DICKSON,*  
*HOLLIS & ELEY, P. C.*  
*18th Floor*  
*Virginia National Bank Bldg.*  
*Norfolk, Virginia 23510*  
Counsel For Appellant

*Robert C. Nusbaum*  
*Linda S. Laibstain*  
*HOFHEIMER, NUSBAUM, McPHAUL*  
*& BRENNER*  
*1010 Plaza One*  
*Norfolk, Virginia 23514*  
Counsel For Appellee



## TABLE OF CONTENTS

APPENDIX  
PAGES

1.	MOTION FOR DECLARATORY JUDGMENT FILED JANUARY 4, 1980 -----	1
2.	ANSWER, FILED JANUARY 30, 1980 -----	11
3.	REQUEST FOR ADMISSION, FILED MARCH 12, 1980 -----	15
4.	RESPONSES TO REQUEST FOR ADMISSION, FILED APRIL 3, 1980 -----	17
5.	AMENDED ANSWER, FILED APRIL 2, 1980 -----	19
6.	AMENDED MOTION FOR JUDGMENT, FILED JUNE 3, 1980 --	23
7.	ANSWER TO AMENDED MOTION FOR JUDGMENT, FILED JUNE 11, 1980 -----	27
8.	AMENDED ANSWER TO THE AMENDED MOTION FOR JUDGMENT, FILED MAY 26, 1981 -----	31
9.	ORDER ENTERED MAY 28, 1981 -----	36
10.	ORDER ENTERED MAY 29, 1981 -----	37
11.	ASSIGNMENTS OF ERROR -----	38
12.	EXCERPTS FROM TRIAL OF MAY 28-29, 1981 BEFORE THE HONORABLE THOMAS R. McNAMARA, JUDGE	
	a) Testimony Of V. H. Nusbaum -----	39
	b) H. Lindsay -----	55
	c) Motion To Strike Colloquy, Etc. -----	73
	d) Dr. Jon Crunkleton -----	81
	e) Alan Nusbaum -----	100
	f) R. E. Airing -----	105
	g) Colloquy, Motions, Etc. -----	115
13.	JOINT EXHIBITS	
	EXHIBIT #1 Application -----	141
	EXHIBIT #2 Claims Made -----	145
	EXHIBIT #7 Letter Dated August 23, 1979 -----	151
	EXHIBIT #9 Letter Dated October, 1, 1979 -----	152
	EXHIBIT #14 Letter Dated July, 11, 1979 -----	154
	EXHIBIT #15 Letter Dated July 27, 1977 -----	155
	EXHIBIT #17 Letter Dated August 29, 1979 -----	156
	EXHIBIT #18 Letter Dated September 11, 1979 -----	159
	EXHIBIT #19 Letter Dated September 18, 1979 -----	160
	EXHIBIT #20 Option Agreement of August 12, 1979 --	161
14	DEFENDANTS EXHIBIT #1 - CHART OF S. L. NUSBAUM AND COMPANY -----	167



MOTION FOR DECLARATORY JUDGMENT

Plaintiff, S. L. Nusbaum & Company, Inc., hereby moves for a Declaratory Judgment pursuant to Section 8.01-184 et seq., Code of Virginia (1977 Rep. Vol.), against St. Paul Fire and Marine Insurance Company, on the grounds set forth below:

1. Plaintiff, S. L. Nusbaum & Company, Inc. ("Nusbaum"), a corporation organized under the laws of the State of Virginia having an office and principal place of business in the City of Norfolk, Virginia, is engaged in the real estate business.

2. Defendant, St. Paul Fire and Marine Insurance Company ("St. Paul"), a corporation organized under the laws of the State of Minnesota, having an office in the City of Norfolk, Virginia, is duly qualified to do and transact business in the State of Virginia and fully empowered to execute liability insurance policies of the general character hereinafter described.

3. An actual controversy of a justiciable nature exists between plaintiff and defendant involving the rights and obligations under a contract of professional liability insurance which may be determined by a judgment under this motion, without other legal proceedings.

4. On July 30, 1977, Nusbaum, to protect itself from liability, entered into an insurance contract with St. Paul. At that time, St. Paul issued to Nusbaum a professional liability policy No. 58LJM3458, (a copy of which is attached hereto as Exhibit "A") for a period of one year.

5. Nusbaum paid the initial annual premium of \$454.00 at the inception of the policy and thereafter paid the required annual premiums to renew the policy. At all times herein pertinent said policy was in full force and effect.



6. By said contract, St. Paul became obligated to pay damages and defend Nusbaum against claims made during the policy period arising out of any negligent act, error or omission in the conduct of Nusbaum's business as real estate agents, with certain enumerated exclusions.

7. In the course of Nusbaum's business as real estate agent, a Nusbaum employee negotiated and consummated a lease with Brady Investment Corporation ("Brady"), for premises located at Hilltop North Shopping Center in the City of Virginia Beach, Virginia.

8. Subsequently, Nusbaum was sued by Brady for an alleged misrepresentation by the aforesaid Nusbaum employee during the course of negotiating the lease for said premises. St. Paul defended Nusbaum against the suit, which was dismissed by Order sustaining Demurrer entered by the Circuit Court of the City of Virginia Beach on September 18, 1979, in the suit entitled SuSu Developers v. Brady Investment Corporation t/a Unsinkable Sub Shop.

9. By letter of October 1, 1979, St. Paul informed Nusbaum that under St. Paul's reservation of rights, it no longer intended to defend Nusbaum against any claim by Brady.

10. On October 11, 1979, Brady filed a Motion for Judgment against Nusbaum alleging substantially the same claim as before in a different form. Since that time St. Paul has been unwilling to assume Nusbaum's defense against Brady's claim, and at the present time the Brady action is pending.

11. Until St. Paul's obligations under the insurance policy are judicially interpreted as requested herein, Nusbaum will have to employ additional counsel and will not know the limits of its possible exposure.



WHEREFORE, plaintiff prays as follows:

1. That the Court enter a declaratory judgment construing the provisions of the policy attached hereto as Exhibit "A" and determining the respective rights and liabilities of the plaintiff and defendant thereunder with respect to the aforesaid claim against Nusbaum.

2. That plaintiff be awarded attorney's fees, its costs and disbursements incurred herein and such other and further relief as may be warranted under the circumstances.

S. L. NUSBAUM & COMPANY, INC.

By Linda S. Laibstain  
Of Counsel

Linda S. Laibstain  
HOFHEIMER, NUSBAUM, MCPHAUL & BRENNER  
1010 Plaza One  
Norfolk, Virginia 23514

Filed in the Clerk's Office the

4th day of January, 1980

Writ Tax \$ 5-  
Law Lib. Tax \$ 25-  
Total Paid \$ 31-

HUGH L. STOVALL, Clerk  
- 3 - Y. Laibstain D.C.

Filed in the Clerk's Office the  
Writ Tax  
Fee  
Law Lib. Tax  
Total Paid

Tester:

HUGH L. STOVALL, CLERK

D.C.



Former Policy No.

OCT 17 1979

NAMED INSURED AND ADDRESS

INSURED

S. L. Nusbaum & Co., Inc.  
922 Maritime Tower  
P.O. Drawer 2491  
Norfolk, Virginia 23501

AGENCY

Tidewater Ins. Agency, Inc.  
P.O. Box 12186  
Norfolk, Virginia 23502  
# 450259-5

DEDUCTIBLE

AUTO-CA'S. DEPT

AUG 08 1977

A. KARNES

Premiums

Losses and Expense  
Paid OutstandingNo.  
Cl.

Premium Audit

Audit copy sent  
to Audit ☐☐ Yes ☐ No

Audit Cancelled

Date

AUDIT PERIOD: (If applicable)  
Annual unless otherwise stated

Engineering

Requested

Ordered

Eng. Serv.

Canc.

Policy Period:

From

7/30/77

To

7/30/78

The business of the Named Insured is:

Real Estate

Deposit  
PremiumTotal Advance  
Premium

\$

\$

298,454

\* 12:01 A.M., Standard Time at the address of the Named Insured.

Automobile premiums are for one year only. Additional years will be computed at the Company's prevailing rates.

The Named Insured is: ☐ Individual; ☐ Partnership; ☐ Joint Venture; ☒ Corporation; ☐ (Other)

The insurance afforded is only with respect to those Coverage Forms for which an X is shown in the appropriate box.

## COVERAGE FORMS

## LIMITS OF LIABILITY

ADVANCE  
PREMIUMS

Basic Automobile Liability	<input type="checkbox"/>	Bodily Injury - Each Person	\$		
Comprehensive Automobile Liability	<input type="checkbox"/>	Bodily Injury - Each Occurrence	\$		
		Property Damage - Each Occurrence	\$		
Automobile Medical Payments	<input type="checkbox"/>	Each Person	\$		
Protection Against Uninsured Motorists	<input type="checkbox"/>	See Coverage Form and Schedule			
Automobile Physical Damage	<input type="checkbox"/>	See Coverage Form and Schedule			
Garage	<input type="checkbox"/>	See Coverage Form and Schedule			
	<input type="checkbox"/>	See Coverage Form or Endorsement			
Comprehensive General Liability	<input type="checkbox"/>	Bodily Injury	\$	Each Occurrence	Aggregate
		Property Damage	\$	\$	\$
Owners', Landlords' and Tenants' Liability	<input type="checkbox"/>	Bodily Injury	\$		
		Property Damage	\$		
Manufacturers' and Contractors' Liability	<input type="checkbox"/>	Bodily Injury	\$		
Contractual Liability	<input type="checkbox"/>	Property Damage	\$		

Property Damage coverage is not included unless a limit of liability is shown.

If an "X" is inserted in the box opposite one of the following optional exclusions, then such exclusion, as set forth in the Coverage Form, shall apply to the insurance afforded.

Exclusion: ☐ 1 - Explosion ☐ 2 - Collapse ☐ 3 - Underground Property Damage

Premises Medical Payments	<input type="checkbox"/>	Each Person	\$	Each Accident	\$
Personal Injury Liability	<input type="checkbox"/>			Aggregate	\$
Comprehensive Personal Insurance	<input type="checkbox"/>	See Coverage Form			\$
Professional Liability	<input checked="" type="checkbox"/>	See Coverage Form	25485		\$ 298,454
	<input type="checkbox"/>	See Coverage Form			\$
	<input type="checkbox"/>	See Coverage Form			\$

Endorsements made part of this Policy at time of issue: (Identify by form number or title)

OCT 17 1979

RCVD 45G

/8/77 djm

Countersignature Date

Countersigned at

Authorized Representative





REAL ESTATE AGENTS ERRORS AND OMISSIONS  
COVERAGE FORM - CLAIMS MADE

For attachment to the St. Paul Liability Policy

PART 1  
Not complete without Part 2

REVISED

The following spaces preceded by an asterisk (\*) need not be completed if this coverage form and the Policy have the same inception d

ATTACHED TO AND FORMING PART OF POLICY NO.	*EFFECTIVE DATE OF COVERAGE FORM	*ISSUED TO
581JM3458		

Subject to all of the provisions of this Coverage Form and the Policy to which it is attached, the Company agrees with the Insured as follows

SCHEDULE

1. Name and Address of Insured (If other than as shown in Item 1 of Declarations)

2. Limits of Liability	3. Retroactive Date Subject to Condition 1(a)	4. Deductible Amount	5. Premium
EACH CLAIM \$ 100,000 ✓	7/30/77 ✓	\$ 2,000 ✓	\$ 298. 2/54
AGGREGATE Three times the dollar amount shown			

6. COVERAGE IS ALSO PROVIDED FOR THE CONDUCT OF THEIR BUSINESS OF EITHER OF THE FOLLOWING THAT IS MARKED WITH AN "X"

☒ AS REAL ESTATE COUNSELORS

☒ AS APPRAISERS OF REAL PROPERTY

TO OUR POLICYHOLDERS

This is a "claims made" Coverage Form. It only covers claims arising from negligent acts, errors or omissions which occur subsequent to the retroactive date indicated and then only to claims first made within the provisions of the Policy while this Coverage Form is in force. No coverage is afforded for claims first made after the termination of this insurance unless and to the extent that Reporting Endorsements are purchased in accordance with Condition 3 of this Coverage Form. Please review the Policy carefully.



REVISED

AUTO-CAS. DEPT.

The following spaces preceded by an asterisk (\*) need not be completed if this coverage form and the Policy have the same inception date

ATTACHED TO AND FORMING  
PART OF POLICY NO.\*EFFECTIVE DATE  
OF COVERAGE FORM

\*ISSUED TO

MAY 22 1978

581JM3458

D. MILLARD

Subject to all of the provisions of this Coverage Form and the Policy to which it is attached, the Company agrees with the Insured as follows:

## SCHEDULE

1. Name and Address of Insured (If other than as shown in Item 1 of Declarations)

2. Limits of Liability

EACH CLAIM

AGGREGATE

\$ 100,000.

Three times the  
dollar amount shown3. Retroactive Date  
Subject to Condition 1(a)

7-30-77

4. Deductible Amount

\$ 2,000.

5. Premium

\$ 454.

6. COVERAGE IS ALSO PROVIDED FOR THE CONDUCT OF THEIR BUSINESS OF EITHER OF THE FOLLOWING THAT IS MARKED WITH AN "X".

☐ WAS REAL ESTATE COUNSELORS☒ WAS APPRAISERS OF REAL PROPERTY

## TO OUR POLICYHOLDERS

This is a "claims made" Coverage Form. It only covers claims arising from negligent acts, errors or omissions which occur subsequent to the retroactive date indicated and then only to claims first made within the provisions of the Policy while this Coverage Form is in force. No coverage is afforded for claims first made after the termination of this insurance unless and to the extent that Reporting Endorsements are purchased in accordance with Condition 3 of this Coverage Form. Please review the Policy carefully.

# RENEWAL CERTIFICATE

AUTO-CAS DEPT.

RENEWAL PERIOD From 7-30-78 To 7-30-79		TYPE OF POLICY Professional Liability		POLICY NO. 581JM3458	
Prepaid Renewal Property	Premium: Gen. Liability 454.	Automobile	Sum Insured (If Changed)	If policy is on a 3 year installment basis, premium is payable At Inception 2nd Year 3rd Year	
\$	\$	\$	\$	\$	\$

NAME AND MAILING ADDRESS OF INSURED

S. L. Nusbaum & Co., Inc.  
922 Maritime Tower  
P. O. Drawer 2491  
Norfolk, VA 23501

For Casualty Department Use Only	
AUDIT	INSPECTION
Annual	Requested
Interim	Ordered
Canc'd.	Canc'd.

In consideration of the renewal premium the above numbered policy is renewed for the period specified, subject to the terms and conditions thereof, except as hereinafter provided:

Exceptions:

If during the policy period (prior to the issuance of this Certificate), the Company's rules were revised so as to extend or broaden the insurance afforded by said policy without additional premium, such extended or broadened insurance shall inure to the benefit of the Insured under this Renewal Certificate.

IN WITNESS WHEREOF, the Company has caused this Certificate to be signed by its President and Secretary but this Certificate shall not be valid unless countersigned by a duly authorized representative of the Company.

*J. P. S. S. S.*  
Secretary

*W. B. S. S.*  
President

AGENCY NAME AND ADDRESS

Tidewater Insurance Agency, Inc.  
P. O. Box 12186  
Norfolk, VA 23502  
450259

Authorized Representative S-19-78 CDH	
Countersign Date	Countersigned At



# RENEWAL CERTIFICATE

RENEWAL PERIOD From 7-30-79 To 7-30-80		TYPE OF POLICY Professional Liability	POLICY NO. 581JM3458		
Prepaid Renewal Premium: Property	Gen. Liability 454.	Automobile	Sum Insured (If Changed)	If policy is on a 3 year installment basis, premium is payable: At Inception 2nd Year 3rd Year	
\$	\$	\$	\$	\$	\$

## NAME AND MAILING ADDRESS OF INSURED

S.L. Nusbaum & Company, Inc.  
922 Maritime Tower,  
PO Drawer 2491  
Norfolk, VA 23501

For Casualty Department Use Only	
AUDIT	INSPECTION
Annual	Requested
Interim	Ordered
Canc'd.	Canc'd.

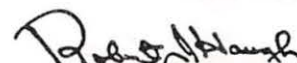
In consideration of the renewal premium the above numbered policy is renewed for the period specified, subject to the terms and conditions thereof, except as hereinafter provided:

Exceptions:

If during the policy period (prior to the issuance of this Certificate), the Company's rules were revised so as to extend or broaden the insurance afforded by said policy without additional premium, such extended or broadened insurance shall inure to the benefit of the Insured under this Renewal Certificate.

IN WITNESS WHEREOF, the Company has caused this Certificate to be signed by its President and Secretary but this Certificate shall not be valid unless countersigned by a duly authorized representative of the Company.

  
Secretary.

  
President.

## AGENCY NAME AND ADDRESS

Tidewater Ins. Agency, Inc.  
PO Box 12186  
Norfolk, VA 23502  
450259-5

Authorized Representative	
6/6/79 ph	
Countersign Date	Countersigned At

8



## INSURING AGREEMENTS

### COVERAGE

pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as money damages (other than exemplary or punitive damages), because of any claim or claims first made against the Insured during the policy period, arising out of any negligent error or omission, occurring subsequent to the retroactive date, in the conduct of the Insured's business as real estate agents, and caused by the Insured or any other person for whose acts the Insured is legally liable, except as excluded or limited by the terms, conditions and exclusions applicable to this Coverage Form.

Except as excluded or limited by the terms, conditions and exclusions applicable to this Coverage Form, the Company shall have the right and duty to defend in the Insured's name and behalf any suit or proceeding against the Insured alleging money damages (other than exemplary or punitive damages) which are payable under the terms of this Coverage Form, even if any of the allegations of the suit or proceeding are groundless, false or fraudulent, and the Company shall have the right to make such investigation and settlement of any claims, and any suits or proceedings arising in connection therewith as may be deemed expedient by the Company. The Company shall not be obligated to pay any claim, judgment or award, or undertake to continue defense of any suit or proceeding after the limit of the Company's liability has been exhausted by payment of judgments, awards or settlements.

### EXCLUSIONS

This Coverage Form and the insurance provided hereby shall not apply to any claim, or any suits or proceedings arising in connection therewith, nor the defense thereof nor the payment of any amount with respect thereto, if and to the extent the claim:

- (1) arises out of or in connection with any dishonesty, intentional fraud, criminal or malicious act, libel or slander;
- (2) arises out of or in connection with any bodily injury to, or sickness, disease or death of any person, or injury to or destruction of any tangible property including the loss of use thereof;
- (3) arises out of or in connection with the failure to effect or maintain adequate insurance;
- (4) arises out of or in connection with operations performed by the Insured under a written management agreement or any situation where the Insured acts in a supervisory capacity for a building owner;
- (5) arises out of or in connection with the management or sale of property developed, constructed or owned by the Insured, or any firm or corporation in which the Insured has a financial interest, or by any firm coming under the same financial control as the Named Insured;
- (6) arises out of or in connection with any Insured's activities as an underwriter, sponsor, partner, joint or co-venturer or member in any real estate partnership, venture or syndicate;
- (7) arises out of or in connection with any allegation of fraud or misrepresentation under state or federal law concerning the purchase or sale of securities.

### DEDUCTIBLE

It is agreed that the Company's obligation to pay money damages on behalf of the Insured applies only to the amount of money damages in excess of any deductible amount stated in the Schedule.

The terms of the Policy, including those with respect to (a) the Company's rights and duties with respect to the defense of suits or proceedings and (b) the Insured's duties in the event of an occurrence, apply irrespective of the application of the deductible amount.

The Company may pay any part or all of the deductible amount to effect settlement of any claim or suit or proceeding arising in connection therewith, and upon notification of the action taken, the Named Insured shall promptly reimburse the Company for such part of the deductible amount as has been paid by the Company.

### PERSONS INSURED

Each of the following is an Insured to the extent set forth below:

- (a) if the Named Insured designated in the Schedule of this Coverage Form is an individual, the person so designated;
- (b) if the Named Insured designated in the Schedule of this Coverage Form is a partnership, the partnership so designated and any partner thereof but only with respect to their liability as such;
- (c) if the Named Insured designated in the Schedule of this Coverage Form is other than an individual or partnership, the organization so designated and any executive officer, director or stockholder thereof but only while acting within the scope of their duties as such;
- (d) any person who is an employee of the Named Insured but only while acting within the scope of their duties as such;
- (e) any person who previously qualified as an Insured under subparagraphs III. (b), (c) or (d) of this Coverage Form prior to termination of the required relationship with the Named Insured but only for negligent acts, errors or omissions which occurred subsequent to the retroactive date applicable to the individual person and prior to the termination of such relationship.

### POLICY PERIOD-TERRITORY

This Coverage Form and the insurance provided hereby only applies to negligent acts, errors or omissions which occur within the United States of America, its territories or possessions or Canada subsequent to the retroactive date stated in the Schedule and then only if claim is first made during the policy period or a reporting period purchased in accordance with Condition 3.

The following provisions shall apply in determining whether a claim is first made during the policy period or a reporting period:

- (a) If during the policy period or a reporting period (if purchased) the Insured shall have knowledge or become aware of any negligent act, error or omission covered hereby, which may subsequently give rise to a claim and shall, during the policy period or such reporting period, give written notice thereof to the Company in accordance with Condition 5(b) (1) of this Coverage Form, then such notice shall be considered a claim made hereunder within the policy period or such reporting period.



under this Coverage Form, any additional claims which are made, or suits or proceedings which are brought subsequent to the policy period, or a reporting period for money damages, resulting from the same or related negligent acts, errors or omissions shall be considered as the claim which was first made during the reporting period or such reporting period.

A claim shall be considered to be first made when the Company first receives notice of the claim or of an occurrence which may subsequently give rise to a claim. (see Condition 3 for Insured's rights to have Reporting Endorsements issued.)

## CONDITIONS

### DEFINITIONS

- (a) "Retroactive date" means the date shown in Item 3 of the Schedule of this Coverage Form. However, with respect to an Insured who becomes an Insured under this Coverage Form subsequent to the retroactive date shown in Item 3 of the Schedule, the retroactive date for that Insured shall be the same as that subsequent date.
- (b) "Policy Period" means the period of coverage commencing on the retroactive date shown in Item 3 of the Schedule of this Coverage Form and ending upon the effective date of termination, expiration or cancellation of coverage under this Coverage Form, and specifically excludes any reporting period purchased hereunder.
- (c) "Policy year" means each consecutive annual period of the policy to which this Coverage Form is attached.
- (d) "Reporting period" means the period of time stated in the "reporting endorsement" for reporting claims or suits or proceedings arising in connection therewith, which arise out of negligent acts, errors or omissions which occur subsequent to the retroactive date and prior to the end of the policy period.

### LIMIT OF LIABILITY

The Limit of Liability stated in the Schedule as applicable to "each claim" is the limit of the Company's liability for all money damages arising out of the same or related negligent acts, errors or omissions without regard to the number of claims, demands, suits, proceedings or claimants. If additional claims are subsequently made which arise out of the same or related negligent acts, errors or omissions as a claim already made, all such claims, whenever made, shall be considered first made within the policy year or reporting period in which the earliest claim arising out of such negligent acts, errors or omissions was first made, and all such claims shall be subject to the same limit of liability.

If the Named Insured applies for reporting period(s) in accordance with Condition 3, the limit of liability stated in the Schedule as applicable to "each claim", at the time the policy is terminated, is the limit of the Company's liability for all claims arising out of the same or related negligent acts, errors or omissions, which are first made during each reporting period.

The limit of liability stated in the Schedule as "aggregate" (which amount shall be three times the dollar amount shown in Item 2. of the Schedule of this Coverage Form) is, subject to the above provisions respecting "each claim", the total limit of the Company's liability for all money damages and claims expenses arising out of claims first made during each policy year or during each reporting period.

The inclusion in the Coverage Form of more than one Insured shall not operate to increase the limits of the Company's liability.

### REPORTING ENDORSEMENT

In the event of termination of insurance either by non-renewal or cancellation of this policy, or termination of a reporting period the Named Insured shall have the right upon payment of an additional premium (to be computed in accordance with the Company's rules, rates, rating plans and premiums applicable on the effective date of the endorsement) to have issued an endorsement(s) providing additional reporting period(s) in which claims otherwise covered by this policy may be reported. The limits of liability shown in Item 2 of the Schedule of this Coverage Form at the time this insurance is terminated shall be the limits applicable to each reporting period. Such right hereunder must, however, be exercised by the Named Insured by written notice not later than thirty (30) days after such termination date.

### ARBITRATION

The Company shall be entitled to exercise all of the Insured's rights in the choice of arbitrators and in the conduct of any arbitration proceeding involving a claim covered by this Coverage Form.

### AMENDED POLICY CONDITIONS

- (a) Condition 1, 2 and 3 do not apply to this Coverage Form.
- (b) Condition 4 is amended to read:

Insured's Duties in the event of an Occurrence, Claim or Suit or Proceeding.

1. Upon any Insured obtaining knowledge or becoming aware of any negligent acts, errors or omissions which may subsequently give rise to a claim against any Insured, written notice containing the fullest information obtainable with respect to the circumstances out of which it arose, including the names and addresses of the clients served, the nature and extent of the services rendered or which should have been rendered and the nature and extent of the type of claim or claims anticipated, shall be given by or for the Insured to the Company or any of its authorized agents as soon as practicable.
  2. If any claim is made or any suit or proceeding arising in connection therewith is brought against any Insured, the Insured shall immediately notify the Company of the nature and extent of each and every threat, or advice of any intention to hold any Insured liable, and every demand, notice summons or other process received by any Insured or any Insured's representative, and shall immediately forward to the Company copies of any of the foregoing which are in writing.
  3. The Insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits and proceedings arising in connection therewith and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Insured because of damages with respect to which insurance is afforded under this policy and the Insured shall attend hearings, trials and proceedings and assist in securing and giving evidence and obtaining the attendance of witnesses. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense.
- (c) Condition 6 is amended to read:
- Other Insurance  
If the Insured has other insurance against a claim covered by this Policy the Company shall not be liable under this Policy for a greater proportion of such claim than the limit of liability stated in the Schedule bears to the total limit of liability of all valid and collectible insurance against such claim.
- (d) Condition 7 is amended to read:
- Subrogation  
In the event of any payment under this Coverage Form the Company shall be subrogated to the extent of such payment to all the Insured's rights of recovery therefor against any person or organization (excluding employees of the Insured) and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.



ANSWER

Now comes the Defendant, St. Paul Fire and Marine Insurance Company, by counsel, and in response to the Motion for Declaratory Judgment filed by the Complainant states as follows:

1. The allegations contained in Paragraphs 1 through 5, inclusive, of the Motion are admitted.

2. In response to the allegations contained in Paragraph 6 of the Motion, Defendant states that the insurance contract in question speaks for itself.

3. With respect to the allegations contained in Paragraph 7 of the Motion, the Defendant denies such allegations with the exception that it admits that a Nusbaum employee negotiated a lease on behalf of SuSu Developers, a Virginia general partnership and owner and developer of Hilltop North Shopping Center, with Brady Investment Corporation ("Brady").

4. The allegations contained in Paragraphs 8 through 10, inclusive, of the Motion are admitted.

5. In response to the allegations contained in Paragraph 11 of the Motion, the Defendant admits that Nusbaum will have to employ its own counsel in defense of the suit filed against it by Brady and denies the remaining allegations of that paragraph.

CIRCUIT COURT

Filed.....

BY:.....

JAN 30 1980

D.B.



## AFFIRMATIVE DEFENSES

Defendant alleges the following affirmative defenses in response to the allegations contained in the Motion for Declaratory Judgment:

### FIRST AFFIRMATIVE DEFENSE

6. Defendant states that the liability policy in question contains a specific exclusion excluding any claims arising " . . . out of or in connection with . . . any situation where the Insured acts in a supervisory capacity for a building owner."

7. That the Insured, S. L. Nusbaum & Co., Inc., was employed in a supervisory capacity by the owner of Hilltop North Shopping Center when the basis for the subject claim arose.

8. That accordingly, Complainant's claim is not within the coverage afforded by the policy in question.

### SECOND AFFIRMATIVE DEFENSE

9. That the liability policy in question contains an exclusion for any claims which " . . . arise out of or in connection with the management or sale of property developed, constructed or owned by the Insured, or any firm or corporation in which the Insured has a financial interest, or by any firm coming under the same financial control as the Named Insured."

10. The the officers and directors of the Complainant, S. L. Nusbaum & Co., Inc., are general partners in SuSu Developers, the owner of Hilltop North Shopping Center.

11. That accordingly, Complainant's claim is not within the coverage of said liability policy.

THIRD AFFIRMATIVE DEFENSE

12. That the subject liability policy contains an exclusion for any claims arising " . . . out or of in connection with any Insured's activities as an underwriter, sponsor, partner, joint or co-venturer or member of any real estate partnership, venture or syndicate."

13. That the officers and directors of the Complainant are general partners in SuSu Developers, which developed and owns Hilltop North Shopping Center.

14. That accordingly, Complainant's claim is not within the limits of coverage of the subject liability policy.

WHEREFORE, the Defendant requests that the Court declare that the Complainant is not entitled to any coverage under the subject liability policy under the circumstances as set forth in the pleadings and that it be awarded its attorney's fees and costs incurred in this matter.

ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY

By James C. Howell  
Of Counsel

James C. Howell  
Willcox, Savage, Lawrence, Dickson  
& Spindle, P.C.  
1800 Virginia National Bank Building  
Norfolk, Virginia 23510



CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer was mailed, postage prepaid, to Linda Laibstain, attorney for the complainant, this 29th day of January, 1980.

James C. Howell

CIRCUIT COURT

Filed

1-30-80

Re Jones D.C.

REQUEST FOR ADMISSIONS

Now comes the defendant, St. Paul Fire and Marine Insurance Company, by counsel, and propounds the following request for admissions to the plaintiff, S. L. Nusbaum and Co., Inc., to be admitted or denied within twenty-one (21) days after service hereof.

1. SuSu Developers ("SuSu") since its inception as a partnership on August 12, 1970 has had no employees other than possibly janitorial personnel supervised by S. L. Nusbaum & Co., Inc. ("Nusbaum").

2. That paragraph 7 of the attached Partnership Agreement of August 12, 1970 embodies the agreement whereby Nusbaum acts as managing and leasing agent for SuSu.

3. That the compensation payable to Nusbaum as leasing and managing agent by SuSu is six percent (6%) of all base rents, percentage rents and common area maintenance charges and other such revenues (not including real estate taxes, business taxes and reimbursement therefor) paid to the account of the firm on leases negotiated by Nusbaum or others.

4. That V. H. Nusbaum, Jr. is a director of Nusbaum and owns nine percent (9%) of the SuSu partnership.

5. That Stanley L. Harrison is Senior Vice President and a director of Nusbaum and owns eleven percent (11%) of the SuSu partnership.

CIRCUIT COURT

Filed 12 MAR 1980  
BY: [Signature] D.C.



6. That Henry A. Shook is Senior Vice President and a director of Nusbaum and owns twenty-seven percent (27%) of the SuSu partnership.

7. That Alan Nordlinger is Senior Vice President and a director of Nusbaum and owns Twenty-nine and seventy-five hundredths percent (29.75%) of the SuSu partnership.

8. That Robert C. Nusbaum is Secretary and a director of Nusbaum and owns three percent (3%) of the SuSu partnership.

9. That the aforesaid officers and directors are Insureds under the insurance policy which is the subject of this litigation.

ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY

By James C. Howell  
Of Counsel

James C. Howell  
Willcox, Savage, Lawrence, Dickson  
& Spindle, P.C.  
1800 Virginia National Bank Building  
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered to Linda Laibstain, counsel for the plaintiff, Hofheimer, Nusbaum, McPhaul & Brenner, 1010 Plaza One Building, Norfolk, Virginia, on this 12th day of March, 1980.

CIRCUIT COURT  
Filed 3-12-80  
BY: pro tempore D.C.

James C. Howell

RESPONSES TO REQUEST FOR ADMISSIONS

Now comes plaintiff, S. L. Nusbaum & Co., Inc., and in response to the Request for Admissions served propounded by defendant, states as follows:

REQUEST #1. SUSU DEVELOPERS ("SUSU") SINCE ITS INCEPTION AS A PARTNERSHIP ON AUGUST 12, 1970 HAS HAD NO EMPLOYEES OTHER THAN POSSIBLY JANITORIAL PERSONNEL SUPERVISED BY S. L. NUSBAUM & CO., INC.

RESPONSE. Plaintiff admits the truth of the matter set forth in this request.

REQUEST #2. THAT PARAGRAPH 7 OF THE ATTACHED PARTNERSHIP AGREEMENT OF AUGUST 12, 1970 EMBODIES THE AGREEMENT WHEREBY NUSBAUM ACTS AS MANAGING AND LEASING AGENT FOR SUSU.

RESPONSE. Plaintiff admits the truth of the matter set forth in this request.

REQUEST #3. THAT THE COMPENSATION PAYABLE TO NUSBAUM AS LEASING AND MANAGING AGENT BY SUSU IS SIX PERCENT (6%) OF ALL BASE RENTS, PERCENTAGE RENTS AND COMMON AREA MAINTENANCE CHARGES AND OTHER SUCH REVENUES (NOT INCLUDING REAL ESTATE TAXES, BUSINESS TAXES AND REIMBURSEMENT THEREFOR) PAID TO THE ACCOUNT OF THE FIRM ON LEASES NEGOTIATED BY NUSBAUM OR OTHERS.

RESPONSE. Plaintiff admits the truth of the matter set forth in this request.

REQUEST #4. THAT V. H. NUSBAUM, JR. IS A DIRECTOR OF NUSBAUM AND OWNS NINE PERCENT (9%) OF THE SUSU PARTNERSHIP.

RESPONSE. Plaintiff admits the truth of the matter set forth in this request.

REQUEST #5. THAT STANLEY L. HARRISON IS SENIOR VICE PRESIDENT AND A DIRECTOR OF NUSBAUM AND OWNS ELEVEN PERCENT (11%) OF THE SUSU PARTNERSHIP.

RESPONSE. Plaintiff admits the truth of the matter set forth in this request.

REQUEST #6. THAT HENRY A. SHOOK IS SENIOR VICE PRESIDENT AND A DIRECTOR OF NUSBAUM AND OWNS TWENTY-SEVEN PERCENT (27%) OF THE SUSU PARTNERSHIP.

RESPONSE. Plaintiff admits the truth of the matter set forth in this request.



REQUEST #7. THAT ALAN NORDLINGER IS SENIOR VICE PRESIDENT AND A DIRECTOR OF NUSBAUM AND OWNS TWENTY-NINE AND SEVENTY-FIVE HUNDREDTHS PERCENT (29.75%) OF THE SUSU PARTNERSHIP.

RESPONSE. Plaintiff admits the truth of the matter set forth in this request.

REQUEST #8. THAT ROBERT C. NUSBAUM IS SECRETARY AND A DIRECTOR OF NUSBAUM AND OWNS THREE PERCENT (3%) OF THE SUSU PARTNERSHIP.

RESPONSE. Plaintiff admits the truth of the matter set forth in this request.

REQUEST #9. THAT THE AFORESAID OFFICERS AND DIRECTORS ARE INSURED UNDER THE INSURANCE POLICY WHICH IS THE SUBJECT OF THIS LITIGATION.

RESPONSE. Plaintiff cannot admit the truth of this request since it is not a question of fact, and further, is not relevant to this action.

S. L. NUSBAUM & COMPANY, INC.

By Linda Laibstain  
Of Counsel

Linda S. Laibstain  
HOFHEIMER, NUSBAUM, MCPHAUL & BRENNER  
1010 Plaza One  
P. O. Box 3508  
Norfolk, Virginia 23514

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered to James C. Howell, counsel for defendant, Virginia National Bank Building, Norfolk, Virginia 23510, on this 2nd day of April, 1980.

CIRCUIT COURT

Filed... 4-3-80

18 BY: per Jones D.C.

Linda Laibstain  
Counsel

AMENDED ANSWER

Now comes the Defendant, St. Paul Fire and Marine Insurance Company, by counsel, and in response to the Motion for Declaratory Judgment filed by the Complainant states as follows:

1. The allegations contained in Paragraphs 1 through 5, inclusive, of the Motion are admitted.

2. In response to the allegations contained in Paragraph 6 of the Motion, Defendant states that the insurance contract in question speaks for itself.

3. With respect to the allegations contained in Paragraph 7 of the Motion, the Defendant denies such allegations with the exception that it admits that a Nusbaum employee negotiated a lease on behalf of SuSu Developers, a Virginia general partnership and owner and developer of Hilltop North Shopping Center, with Brady Investment Corporation ("Brady").

4. The allegations contained in Paragraphs 8 through 10, inclusive, of the Motion are admitted.

5. In response to the allegations contained in Paragraph 11 of the Motion, the Defendant admits that Nusbaum will have to employ its own counsel in defense of the suit filed against it by Brady and denies the remaining allegations of that paragraph.

CIRCUIT COURT  
FILED..... APR 2 1980  
BY:..... *[Signature]* D.C.



## AFFIRMATIVE DEFENSES

Defendant alleges the following affirmative defenses in response to the allegations contained in the Motion for Declaratory Judgment:

### FIRST AFFIRMATIVE DEFENSE

6. Defendant states that the liability policy in question contains a specific exclusion excluding any claims arising " . . . out of or in connection with . . . any situation where the Insured acts in a supervisory capacity for a building owner."

7. That the Insured, S. L. Nusbaum & Co., Inc., was employed in a supervisory capacity by the owner of Hilltop North Shopping Center pursuant to the terms of a certain Partnership Agreement, dated August 12, 1970, between SuSu Co. and S. L. Nusbaum & Company, Inc. when the basis for the subject claim arose.

8. That accordingly, Complainant's claim is not within the coverage afforded by the policy in question.

### SECOND AFFIRMATIVE DEFENSE

9. That the liability policy in question contains an exclusion for any claims which " . . . arise out of or in connection with the management or sale of property developed, constructed or owned by the Insured, or any firm or corporation in which the Insured has a financial interest, or by any firm coming under the same financial control as the Named Insured."

10. That the officers and directors of the Complainant, S. L. Nusbaum & Co., Inc. are general partners in SuSu Developers, the owner of Hilltop North Shopping Center.

11. That accordingly, Complainant's claim is not within the coverage of said liability policy.

THIRD AFFIRMATIVE DEFENSE

12. That the subject liability policy contains an exclusion for any claims arising " . . . out of or in connection with any Insured's activities as an underwriter, sponsor, partner, joint or co-venturer or member of any real estate partnership, venture or syndicate."

13. That the officers and directors of the Complainant are general partners in SuSu Developers, which developed and owns Hilltop North Shopping Center.

14. That accordingly, Complainant's claim is not within the limits of coverage of the subject liability policy.

WHEREFORE, the Defendant requests that the Court declare that the Complainant is not entitled to any coverage under the subject liability policy under the circumstances as set forth in the pleadings and that it be awarded its attorney's fees and costs incurred in this matter.

ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY

By

  
Of Counsel

James C. Howell  
Willcox, Savage, Lawrence, Dickson  
& Spindle, P.C.  
1800 Virginia National Bank Building  
Norfolk, Virginia 23510



I hereby certify that a true copy of the foregoing Amended Answer was mailed, postage prepaid, to Linda Laibstain, counsel for the complainant, this 1<sup>st</sup> day of April, 1980.

James C. Harrell  
CLERK OF COURT

Filed 4-2-80  
BY: potany D.C.

AMENDED MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF THE AFORESAID COURT:

Plaintiff, S. L. Nusbaum & Company, Inc., ("Nusbaum"),  
for its Amended Motion for Judgment against defendant, St. Paul Fire  
and Marine Insurance Company, ("St. Paul"), states as follows:

COUNT I

1. Nusbaum, a corporation organized under the laws of the  
State of Virginia having an office and principal place of business in  
the City of Norfolk, Virginia, is engaged in the business of selling  
and leasing real estate owned by its principals.

2. St. Paul, a corporation organized under the laws of  
the State of Minnesota, having an office in the City of Norfolk,  
Virginia, is duly qualified to do and transact business in the State  
of Virginia and fully empowered to execute liability insurance poli-  
cies of the general character hereinafter described.

3. On July 30, 1977, Nusbaum to protect itself from  
liability, entered into an insurance contract with St. Paul. At that  
time, St. Paul issued to Nusbaum its professional liability policy No.  
581JM3458 for a period of one year. A copy of the aforesaid policy is  
attached to the Motion for Declaratory Judgment previously filed  
herein and is incorporated herein by reference.

CIRCUIT COURT  
Filed JUN 3 1986  
BY: [Signature] (D.C.)



4. Nusbaum paid the initial annual premium of \$454.00 at the inception of the policy and thereafter paid the required annual premiums to renew the policy. At all times herein pertinent said policy was in full force and effect.

5. By the terms of the contract, St. Paul became obligated to pay damages and defend Nusbaum against claims made during the policy period arising out of any negligent act, error or omission in the conduct of Nusbaum's real estate business, with certain enumerated exclusions.

6. In the course of Nusbaum's business as real estate agent, and acting in that capacity as leasing agent for SuSu Developers, a partnership, a Nusbaum employee negotiated and consummated a lease with Brady Investment Corporation ("Brady"), for premises located at Hilltop North Shopping Center ("Hilltop") in the City of Virginia Beach, Virginia.

7. Subsequently, Nusbaum was notified by Brady that Brady had suffered damages resulting from a misrepresentation by the aforesaid Nusbaum employee during the course of negotiating the Brady Hilltop lease.

8. Nusbaum promptly notified defendant of the claim, and in reliance upon the instructions of defendant's authorized agents, refused to pursue settlement negotiations initiated by Brady.

9. On or about July 13, 1979, Brady commenced an action by a Cross-Bill against Nusbaum in the Circuit Court of Virginia Beach, Virginia, in response to a suit by SuSu Developers against Brady for rent.

10. Defendant undertook to defend Nusbaum by investigating the claim and filing a demurrer to Brady's Cross-Bill against Nusbaum. The demurrer was sustained, without prejudice to Brady, on procedural grounds.

11. Thereafter, St. Paul informed Nusbaum that under St. Paul's reservation of rights, it no longer intended to defend Nusbaum against any claim by Brady.

12. On October 11, 1979, Brady filed a Motion for Judgment against Nusbaum alleging substantially the same claim. Nusbaum promptly notified defendant and defendant refused and has continued to refuse to defend the action or to assume any responsibility therefor, contrary to its obligation under the insurance policy described above.

13. As a result of defendant's failure and refusal to continue its defense of the action, Nusbaum was compelled to retain the services of counsel to represent its interests in the action.

14. On April 10, 1980, a trial of the action was commenced in the Circuit Court of Virginia Beach, Virginia, which resulted in a verdict in favor of Brady against Nusbaum and SuSu Developers, jointly and severally, in the amount of \$35,000.00, and the Court rendered judgment in favor of Brady in accordance with the jury verdict.

15. The aforesaid conduct by St. Paul constitutes a breach of contract for which plaintiff has suffered damages. Wherefore, plaintiff prays for judgment against St. Paul for \$50,000.

## COUNT II

As and for its second cause of action against St. Paul, and alternative to the cause of action alleged in Count I, Nusbaum states as follows:

16. Nusbaum repeats and realleges all of the allegations contained in paragraphs 1 through 14 of Count I, and makes them a part hereof as if specifically set forth at length herein.



17. Defendant undertook in the first instance to represent plaintiff, without reservation, and in reliance upon that position and the instructions of defendant's agents, plaintiff was precluded from pursuing settlement negotiations to compromise the claim in the approximate amount of ~~\$10,000.00~~ <sup>\$12,000.00</sup>

18. As a proximate result of defendant's negligence in failing to make a good faith offer of compromise when it had a full opportunity to do so, plaintiff was damaged by incurring the liability of the aforesaid judgment, attorney's fees and costs.

WHEREFORE, plaintiff moves for judgment against defendant in the amount of \$35,000.00.

S. L. NUSBAUM & COMPANY, INC.

Linda Laibstain  
Of Counsel

Linda S. Laibstain  
HOFHEIMER, NUSBAUM, MCPHAUL & BRENNER  
1010 Plaza One  
P. O. Box 3508  
Norfolk, Virginia 23514

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Amended Motion for Judgment was mailed this 3rd day of June, 1980, to all counsel of record.

Linda Laibstain  
Counsel

CIRCUIT COURT  
FILED 6-3-80  
per [signature] D.C.  
26

ANSWER TO  
AMENDED MOTION FOR JUDGMENT

Now comes the Defendant, St. Paul Fire and Marine Insurance Company, by counsel, and in response to the Amended Motion for Judgment filed by the Plaintiff, states as follows:

COUNT I

1. The allegations contained in Paragraphs 1 through 4, inclusive, of the Amended Motion for Judgment are admitted.

2. In response to the allegations contained in Paragraph 5 of the Amended Motion, Defendant states that the insurance contract in question speaks for itself.

3. With respect to the allegations contained in Paragraph 6 of the Amended Motion, the Defendant denies such allegations with the exception that it admits that a Nusbaum employee negotiated a lease on behalf of SuSu Developers, a Virginia general partnership and owner and developer of Hilltop North Shopping Center, with Brady Investment Corporation ("Brady").

4. The allegations contained in Paragraph 7 are admitted.

5. The allegations contained in Paragraph 8 are denied.

6. The allegations contained in Paragraphs 9 through 11, inclusive, are admitted.

7. The allegations contained in Paragraph 12 are admitted with the exception that it is denied that the Defendant's refusal to defend the Brady action was contrary to its obligation under the insurance policy which is the subject of this suit.

8. In response to the allegations contained in Paragraph 13 of the Amended Motion, the Defendant admits that Nusbaum



employed its own counsel to defend the Brady suit and denies the remaining allegations of that paragraph.

9. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 14 of the Amended Motion for Judgment and accordingly denies same and calls for strict proof thereof.

10. The allegations contained in Paragraph 15 are denied.

#### COUNT II

11. The Defendant repeats and realleges all of the responses contained in Paragraphs 1 through 10 of Count I, and incorporates them as a part hereof as if specifically set forth in this Count II.

12. The allegations contained in Paragraphs 17 and 18 of the Amended Motion are denied.

#### AFFIRMATIVE DEFENSES

Defendant alleges the following affirmative defenses in response to the allegations contained in the Amended Motion for Judgment:

##### FIRST AFFIRMATIVE DEFENSE

13. Defendant states that the liability policy in question contains a specific exclusion excluding any claims arising " . . . out of or in connection with . . . any situation where the Insured acts in a supervisory capacity for a building owner."

14. That the Insured, S. L. Nusbaum & Co., Inc., was employed in a supervisory capacity by the owner of Hilltop North Shopping Center pursuant to the terms of a certain

Partnership Agreement, dated August 12, 1970, between SuSu Co. and S. L. Nusbaum & Company, Inc. when the basis for the subject claim arose.

15. That accordingly, Complainant's claim is not within the coverage afforded by the policy in question.

#### SECOND AFFIRMATIVE DEFENSE

16. That the liability policy in question contains an exclusion for any claims which " . . . arise out of or in connection with the management or sale of property developed, constructed or owned by the Insured, or any firm or corporation in which the Insured has a financial interest, or by any firm coming under the same financial control as the Named Insured."

17. That the officers and directors of the Complainant, S. L. Nusbaum & Co., Inc. are general partners in SuSu Developers, the owner of Hilltop North Shopping Center.

18. That accordingly, Complainant's claim is not within the coverage of said liability policy.

#### THIRD AFFIRMATIVE DEFENSE

19. That the subject liability policy contains an exclusion for any claims arising " . . . out of or in connection with any Insured's activities as an underwriter, sponsor, partner, joint or co-venturer or member of any real estate partnership, venture or syndicate."

20. That the officers and directors of the Complainant are general partners in SuSu Developers, which developed and owns Hilltop North Shopping Center.

21. That accordingly, Complainant's claim is not within the limits of coverage of the subject liability policy. 29



WHEREFORE, the Defendant requests that the Court declare that the Complainant is not entitled to any coverage under the subject liability policy under the circumstances as set forth in the pleadings and that it be awarded its attorney's fees and costs incurred in this matter.

ST. PAUL FIRE AND MARINE INSURANCE  
COMPANY

By *James C. Howell*

Of Counsel

James C. Howell  
Willcox, Savage, Lawrence, Dickson  
& Spindle, P.C.  
1800 Virginia National Bank Building  
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer to Amended Motion for Judgment was mailed, postage prepaid, to Linda Laibstain, counsel for the Plaintiff, this 10th day of June, 1980.

*James C. Howell*  
JUL 11 1980

Filed *AM*

AMENDED ANSWER TO THE  
AMENDED MOTION FOR JUDGMENT

Now comes the Defendant, St. Paul Fire & Marine Insurance Company, by counsel, and as its amended response to the Amended Motion for Judgment filed by the Plaintiff, states as follows:

COUNT I

1. The allegations contained in Paragraphs 1 through 4, inclusive, of the Amended Motion for Judgment are admitted.

2. In response to the allegations contained in Paragraph 5 of the Amended Motion, Defendant states that the insurance contract in question speaks for itself.

3. With respect to the allegations contained in Paragraph 6 of the Amended Motion, the Defendant denies such allegations with the exception that it admits that a Nusbaum employee negotiated a lease on behalf of SuSu Developers, a Virginia general partnership and owner and developer of Hilltop North Shopping Center, with Brady Investment Corporation ("Brady").

4. The allegations contained in Paragraph 7 are admitted.

5. The allegations contained in Paragraph 8 are denied.

6. The allegations contained in Paragraphs 9 through 11, inclusive, are admitted.

7. The allegations contained in Paragraph 12 are admitted with the exception that it is denied that the Defendant's refusal to defend the Brady action was contrary to its obligation under the insurance policy which is the subject of this suit.



8. In response to the allegations contained in Paragraph 13 of the Amended Motion, the Defendant admits that Nusbaum employed its own counsel to defend the Brady suit and denies the remaining allegations of that paragraph.

9. Defendant is without sufficient information to admit or deny the allegations contained in Paragraph 14 of the Amended Motion for Judgment and accordingly denies same and calls for strict proof thereof.

10. The allegations contained in Paragraph 15 are denied.

#### COUNT II

11. The Defendant repeats and realleges all of the responses contained in Paragraphs 1 through 10 of Count I, and incorporates them as a part hereof as if specifically set forth in this Count II.

12. The allegations contained in Paragraphs 17 and 18 of the Amended Motion are denied.

#### AFFIRMATIVE DEFENSES

Defendant alleges the following affirmative defenses in response to the allegations contained in the Amended Motion for Judgment:

##### FIRST AFFIRMATIVE DEFENSE

13. Defendant states that the liability policy in question contains a specific exclusion excluding any claims arising " . . . out of or in connection with . . . any situation where the Insured acts in a supervisory capacity for a building owner."

14. That the Insured, S. L. Nusbaum & Co., Inc., was employed in a supervisory capacity by the owner of Hilltop

North Shopping Center pursuant to the terms of a certain Partnership Agreement, dated August 12, 1970, between SuSu Co. and S. L. Nusbaum & Company, Inc. when the basis for the subject claim arose and when the claim was made.

15. That accordingly, Plaintiff's claim is not within the coverage afforded by the policy in question.

#### SECOND AFFIRMATIVE DEFENSE

16. That the liability policy in question contains an exclusion for any claims which " . . . arise out of or in connection with the management or sale of property developed, constructed or owned by the Insured, or any firm or corporation in which the Insured has a financial interest, or by any firm coming under the same financial control as the Named Insured."

17. That the officers and directors, who owned and now own controlling interest in the Plaintiff, also owned controlling interest in SuSu Developers, the owner and developer of Hilltop North Shopping Center, when the subject claim arose and was made and the Plaintiff, both now and when the claim arose and was made, owned all of the stock of SuSu Co., a general partner in SuSu Developers.

18. This is thus a claim arising out of or in connection with the management of property developed, constructed or owned by a firm in which the Plaintiff has a financial interest and under the same financial control as the Plaintiff and Plaintiff's claim is not with the coverage of said liability policy.



THIRD AFFIRMATIVE DEFENSE

19. That the subject liability policy contains an exclusion for any claims arising " . . . out of or in connection with any Insured's activities as an underwriter, sponsor, partner, joint or co-venturer or member of any real estate partnership, venture or syndicate."

20. That the officers and directors of the Plaintiff, both now and when the claim arose and was made, are and were partners in SuSu Defelopers and that Plaintiff, both now and when the claim arose and was made, owned all of the stock of SuSu Co., a general partner in SuSu Developers.

21. This is thus a claim arising out of or in connection with Plaintiff's activities as a partner, joint or co-venturer or member of a real estate partnership, venture or syndicate, and Plaintiff's claim is not within the coverage of said liability policy.

WHEREFORE, the Defendant requests that the Court declare that the Plaintiff is not entitled to any coverage under the subject liability policy under the circumstances as set forth in the pleadings and that Defendant be awarded its attorney's fees and costs incurred in this matter.

ST. PAUL FIRE & MARINE INSURANCE  
COMPANY

By James C. Howell  
Of Counsel

James C. Howell  
Willcox, Savage, Lawrence, Dickson &  
Spindle, P.C.  
1800 Virginia National Bank Building  
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Amended Answer to the Amended Motion for Judgment was hand-delivered to Linda Laibstain, counsel for the Plaintiff, on this the 26th day of May, 1981.

James C. Howell

~~RECEIVED~~  
FILED 26 MAY 1981  
BY [Signature]



ORDER

This day came the parties, by their representatives and by counsel and thereupon came a jury to-wit: Lela W. Bruns, Bertha P. Carroll, Toni Dennis, Olivia C. Freeman, Tamara M. Hill, Louise Matthews and Christy H. Parker who were duly sworn the truth to speak upon the issue joined.

B 114  
Thereupon at the conclusion of the plaintiff's evidence, the defendant, by counsel moved the Court to strike the plaintiff's evidence and to enter summary judgment in its behalf, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendant, by counsel noted its exception.

Now at 5:00 o'clock P.M. Court was adjourned until 9:00 A.M. Friday, the 29th day of May, 1981.

  
THOMAS R. MCNAMARA  
JUDGE

ORDER

This day came again the parties, by their representatives and by counsel and came as well the same jury heretofore impaneled and sworn pursuant to adjournment on the 28th day of May, 1981.

Thereupon at the conclusion of all of the evidence, the defendant, by counsel renewed its motion heretofore made to strike the plaintiff's evidence and to enter summary judgment in its behalf, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendant, by counsel noted its exception.

70/52  
Thereupon the plaintiff, by counsel moved the Court to strike the defendant's evidence and to enter judgment in its behalf, which motion after having been fully heard and maturely considered by the Court, is sustained, to which action of the Court, the defendant, by counsel noted its exception.

B 116  
Whereupon it is considered and ordered by the Court that the said plaintiff recover of and have judgment against the said defendant in the sum of Forty Five Thousand Two Hundred and Sixty Eight Dollars and Twenty Eight Cents (\$45,268.28) with interest thereon at the rate of eight percentum from the 29th day of May, 1981, until paid, together with its costs about its suit herein expended.

  
THOMAS R. McNAMARA  
JUDGE

Office of  
GH L. STOVALL  
Clerk of the  
Circuit Court  
Norfolk, Virginia

### Assignments of Error

The Petitioner maintains that the lower court erred in the following respects:

1. In denying Petitioner's motion to strike the Respondent's evidence and to enter summary judgment in its favor as moved on May 28, 1981 in light of the evidence adduced at trial as set forth more fully hereinafter;
2. In refusing the admission of Exhibit D-A, reflecting a gross profit analysis of Nusbaum for the years 1974-1980;
3. In denying Petitioner's motion to strike Respondent's evidence and to enter summary judgment in its favor and in granting Respondent's motion to strike Petitioner's evidence and consequently entering judgment in Respondent's favor in the amount of \$45,268.28 despite the evidence adduced at trial as set forth more fully hereinafter.



DIRECT EXAMINATION

BY MS. LAIBSTAIN:

Q Would you state your name for the record?

A V. H. Nusbaum, Jr.

Q And what are you known by?

A I have a nickname of Pooch.

Q Okay. What's your position with S. L. Nusbaum  
and Company?

A Chairman of the Board.

Q How long has S. L. Nusbaum been in existence?

A Since 1911.

Q How long have you been involved in the company?

A Since 1947.

Q Will you explain for us a little bit about the  
kind of activities that S. L. Nusbaum's involved in?

A We are in the general real estate business.  
Primarily commercial. Sales, development, and management.  
We manage apartment houses in the Tidewater area. We manage  
and lease shopping centers in the Tidewater area, and also  
in Maryland and North Carolina. We manage and lease office  
buildings in the Tidewater area.

Q Now, you say you have been involved in the  
business since 1947?

A That's correct, yes.

Q In what capacity have you been involved?

1           A       Well, I started out working for my father as  
2 a salesman, and when he became incapacitated in 1953, I  
3 became the active head of the company. I became president  
4 of the company upon his death in 1958.

5           Q       Are you still involved in the business to any  
6 extent?

7           A       My son is now president of the company and  
8 has been for the last several years. He is the executive  
9 officer. I still am involved, but not as actively as I  
10 was.

11          Q       Can you explain for us a little bit about how  
12 the company is set up? Is there any kind of internal  
13 structure to handle the various, different areas that you  
14 just described?

15          A       Yes. We have a commercial sales department.  
16 We have a management department. Well, we have two  
17 management departments. One handles residential management,  
18 which is strictly apartment houses. We don't have any single  
19 family management. We have a management department that  
20 handles shopping centers that we're agents for, or in some  
21 cases, we have an interest in. We have a management department  
22 that handles the management of office buildings. We have a  
23 leasing department that handles the leasing of office  
24 buildings, and a leasing department that handles the leasing  
25 of shopping centers.

1 We also have a maintenance department,  
2 engineering department.

3 Q You have listed separate departments for --  
4 for example, commercial sales and management and leasing.  
5 Are the same people involved in these departments, or are  
6 they different people?

7 A Different people.

8 Q Why is that?

9 A Each has their own particular talents and  
10 particular qualities that qualify them for the job that they  
11 are assigned to.

12 Q When you are asked to manage a shopping center,  
13 or to perform various functions for them, are they delineated  
14 in any way?

15 A Well, in some instances the functions are  
16 delineated by the person who employs our services. There  
17 have been instances when we have been employed to manage.  
18 There have been instances when we have been employed to lease,  
19 and of course, instances where we do both.

20 Q What were you doing at Hilltop North?

21 A We were leasing and managing and still are  
22 leasing and managing Hilltop North Shopping Center.

23 Q Are you familiar with S. L. Nusbaum's insurance  
24 coverage, specifically, its errors and omissions coverage during  
25 1979?

\* \* \*



1 Hilltop involving Mr. Payne's client, and I met with them  
2 the next day, I suppose.

3 Q Do you remember when that was?

4 A June 26, 1979.

5 Q Who was present at the meeting?

6 A Mr. Payne, Mr. Brady, and I am satisfied that  
7 I asked Mr. Jacobson, who is the head of the leasing  
8 department, to join us.

9 Q What was discussed at that meeting, and if you  
10 can be as specific as your memory allows in terms of what  
11 was said to you and what you responded?

12 A Mr. Payne, as I recall, did most of the  
13 talking, and he made me aware of the fact that his client was  
14 a tenant of ours at Hilltop North Shopping Center. During  
15 the leasing negotiations, which were held with Ed Goldmeier  
16 of our office, apparently Mr. Goldmeier had misrepresented  
17 a figure to Mr. Brady, which we did not deny at all.  
18 I found out in my inquiry that, as a matter of fact, he did  
19 misrepresent unintentionally, but he did misrepresent the  
20 figure of the gross sales of the previous occupant of the  
21 premises that Mr. Brady leased.

22 Mr. Brady supposedly had relied heavily on the  
23 figure that Mr. Goldmeier had given him. He and his attorney  
24 came up to tell me that their business was not up to their  
25 expectations, and they were unable to pay the rent, and they

1 would like to seek some remedy from our company for the  
2 misrepresentation, and to help them solve Mr. Brady's problems.  
3 I listened, and Mr. Jacobson, the head of our leasing  
4 department, confirmed the fact that there was a misrepresentation.  
5 He did not see how that could have materially affected  
6 Mr. Brady's decision to lease the premises, but we did not  
7 ever deny the fact that a misrepresentation was made on our  
8 part.

9 I told Mr. Brady and Mr. Payne that we would  
10 look into the matter and get back to them, and we would  
11 see what we would do, that we were sympathetic, but I could  
12 not give him an answer at that moment.

13 Q Were there any discussions as to trying to work  
14 out this case between the two parties as far as numbers went?

15 A Mr. Payne told me that Mr. Brady had suffered  
16 substantial damage, but he allowed as how if the three months  
17 rent could be waived, the past due rent that was in arrears  
18 could be waived, and if Mr. Brady could be compensated for  
19 some of the fixture expense that he had gone to, that he  
20 thought this matter could be settled. He also suggested that  
21 Mr. Brady might be interested in remaining in half of the  
22 premises, if we would allow him to subdivide the premises, cut  
23 it in half, and if we would participate in dividing the store.

24 Q Did you leave that meeting with any feeling as  
25 to how much the claim might be settled for?

1 Q Were you given any notification besides the  
2 fact that the company was no longer defending S. L. Nusbaum?  
3 Was anything communicated to you about liability or settlement  
4 negotiations?

5 A Not to me personally, no.

6 Q Were you ever advised to enter into settlement  
7 negotiations with Mr. Brady after that time by anybody from  
8 St. Paul?

9 A No, I was never advised to negotiate a settlement.

10 Q Mr. Nusbaum, were you aware that your coverage,  
11 insurance coverage, was not for property management?  
12 Was there any problem with that?

13 A I was aware of that, yes.

14 Q Did that disturb you at all?

15 A No. We have other forms of insurance that  
16 cover liability, and we're not in the habit of making errors  
17 and omissions in our business at all. In property management  
18 we felt fairly secure, but thought it wise to have the  
19 insurance for whatever coverage it would supply us.

20 Q Within S. L. Nusbaum, and the organization  
21 therein, how would you categorize the relationship between  
22 Mr. Goldmeier and Mr. Brady? Would that be property management  
23 without S. L. Nusbaum's organization, or a leasing function?

24 A Mr. Goldmeier was employed in our commercial  
25 leasing department, in shopping center leasing to be specific.



1 Q Was he in any way involved in property  
2 management?

3 A No, he was not.

4 Q Can you explain a little bit for us about the  
5 relationship between S. L. Nusbaum and Company and SuSu  
6 Developers? SuSu Company and the insurance company?

7 A Yes. Hilltop North Shopping Center was  
8 initially created and developed by one of the partners of  
9 S. L. Nusbaum and Company. A gentleman by the name of  
10 Alan Nordlinger, who happens also to be a vice president of  
11 S. L. Nusbaum and Company. Some of the partners of S. L.  
12 Nusbaum and Company became partners of the Hilltop North  
13 Shopping Center venture known as SuSu Development, if that  
14 doesn't confuse you.

15 Q Okay. So there are interlocking relationships?

16 A Yes, sir.

17 A Was this ever hidden in any way from the  
18 insurance company?

19 A No.

20 Q Do you know whether they were aware of it?  
21 Do you know whether your insurance people were aware of it?

22 A Yes, they were aware of it. Our insurance agent?

23 Q Yes, that's correct.

24 A Yes, they were. They advised us of the  
25 exclusions of the policy because of interlocking ownership,

\* \* \* ATEs

REGISTERED PROFESSIONAL REPORTERS  
NORFOLK, VIRGINIA

1 Q I hand you Exhibit Number 13. Can you identify  
2 this?

3 A This is a check for \$36,878.10 to Mr. Brady's  
4 corporation and to his attorney, representing the \$35,000  
5 verdict plus the interest that had accrued on it, which was  
6 paid in December of 1980.

7 Q I hand you one more exhibit. This is Exhibit  
8 Number 12. Can you identify this?

9 A This is the costs. It's a bill from your  
10 company for costs actually advanced, rendered, in our behalf  
11 in the amount of \$1,358 regarding the suit in which you  
12 defended us and in which Mr. Brady's corporation obtained  
13 a \$35,000 verdict.

14 Q Has this been paid?

15 A Yes, it has.

16 MS. LAIBSTAIN: Will you answer Mr. Howell's  
17 questions, please?

18 THE WITNESS: Yes.

19  
20 CROSS-EXAMINATION

21 BY MR. HOWELL:

22 Q Mr. Nusbaum, earlier in your testimony you were  
23 discussing the departmental structural arrangement of S. L.  
24 Nusbaum, and you, I think, indicated that you have a leasing  
25 department, you have a management department, you have an

1 engineering maintenance department, and things of that nature.  
2 In the process of that, it was my understanding that you  
3 indicated that people came to you and asked to have leasing  
4 done; people came to you and asked to have property  
5 management done, and people came to you and asked to have  
6 both done; is that correct?

7 A Yes, sir.

8 Q In point of fact, it's extremely rare when  
9 someone comes to you and asks to have leasing done, as opposed  
10 to property management, as you define it, is it not?

11 A I wouldn't say it's extremely rare. It's the  
12 exception rather than the rule, but we've had it happen on  
13 more than one occasion.

14 Q Let me ask you if you remember a week ago Monday,  
15 being deposed in our office, under oath, and let me read you  
16 a section of that deposition, and ask you if that was, in  
17 fact, what you had said? In order to be perfectly fair, I  
18 have to back up because these questions ran into one another.  
19 Page 22 through 24.

20 THE COURT: Your question to the witness,  
21 Mr. Howell, was were these questions asked, and were these  
22 your answers to these questions?

23 MR. HOWELL: Yes, sir.

24 THE COURT: Read what you think is pertinent.  
25



1 BY MR. HOWELL:

2 Q The question was asked:

3 "Q The other distinction I'm trying to  
4 visualize in my own mind is, we have talked about  
5 that leasing was a separate function from  
6 property management.

7 "A Right.

8 "Q And I had assumed by them being separate  
9 functions, that in a commercial complex, for  
10 instance, someone could come to you and contract  
11 for property management service and/or a leasing  
12 service, and that they would have their choice  
13 as to whether they wanted either or both?

14 "A It has happened, yes.

15 "Q And what I was trying to get is the feel  
16 for was, you have indicated that 90 percent of  
17 it comes from property management.

18 "A 90 percent of our income.

19 "Q Yes. Either residential or commercial,  
20 and what I was trying to get at is, what kind of  
21 percentage could be ascribed to situations where  
22 there is a leasing function only?

23 "A Very little currently. We have had some  
24 deals that we were initially hired to just  
25 handle the leasing. In most instances -- the

1           only instance that I can recall recently, and  
2           we were subsequently hired to do this management,  
3           was a doctor's building on Kempsville Road,  
4           commercial properties, shopping centers, to be  
5           specific. I don't recall any deals where we have  
6           been hired to do the leasing and not the  
7           management.

8           "Q.     So those people would take a package, so  
9           to speak?

10          "A.     Well, first comes the leasing and  
11          subsequently comes the management, but without  
12          any leasing you would have no management.

13          "Q.     So the 90-percent figure you were talking  
14          about would entail any of those isolated  
15          instances where someone would just ask for a  
16          leasing function as opposed to a property  
17          management function?

18          "A.     Well, I don't think we have had any such  
19          request in the last five years."

20                 My question to you, based on that, was that the  
21          question was that they were the questions you were asked, and  
22          in fact, they were your answers?

23                 A.     Yes, they were.

24                 Q.     So my question is, then, again is it not true  
25          that those instances where someone asked for a leasing function

1 as opposed to asking for both functions, as you define them,  
2 has been extremely rare in the last five years for S. L.  
3 Nusbaum and Company?

4 A Well, in the last five years, yes. I can  
5 recall some before that, though.

6 Q You were discussing at one point in your  
7 direct examination the discussions which you had had with  
8 Mr. Payne and Mr. Brady in Mr. Jacobson's presence on June 26,  
9 1979. At that time you had not contacted the insurance  
10 company, had you?

11 A No. I had not been acquainted adequately with  
12 the problem to be able to do so.

13 Q As I understand it, you took the position at  
14 that point that Mr. Payne communicated to you an offer of  
15 settlement; is that correct?

16 A He communicated to me what he thought his client  
17 would be willing to take in order to vacate the premises and  
18 satisfy him, yes.

19 Q And you, in turn, take the position that you  
20 communicated that offer to Mr. Rigsbee?

21 A Yes, I did.

22 Q And also to Mr. Doumar?

23 A Subsequently, yes.

24 Q Would you tell me again, briefly, what that  
25 proposal was?



1 A It was in the neighborhood of \$15,000, and  
2 it involved \$3,000 in rent that Mr. Brady was behind, and  
3 some twelve to \$13,000 in expenses that he had incurred that  
4 he would like to recoup.

5 Q Was it not, in fact, also a part of that  
6 proposal that there would be a remodeling of the space so  
7 he could then run the counter operation?

8 A Yes. I think that was definitely discussed  
9 that Mr. Brady would consider remaining in half of the  
10 premises which would have involved subdividing the premises.

11 Q You were also discussing on direct examination,  
12 the question of the interlocking nature of the officers,  
13 directors and shareholders of S. L. Nusbaum and SuSu Developers,  
14 which developed and owns Hilltop North Shopping Center, were  
15 you not?

16 A Yes.

17 Q And is it not, in fact, true that S. L. Nusbaum  
18 and Company, Incorporated, the plaintiff in this matter, comes  
19 under the same financial control as SuSu Developers?

20 A No. I would say no to that.

21 Q Would you say SuSu Developers comes under the  
22 same financial control as S. L. Nusbaum and Company?

23 A I would say no to that too.

24 Q Could you tell me what percentage of SuSu  
25 Developers is owned by the officers and directors and shareholders

1 of S. L. Nusbaum?

2 A I am advised that 79 percent of the ownership  
3 of SuSu are people that are stockholders of S. L. Nusbaum.

4 Q What percentage of S. L. Nusbaum stock do those  
5 people who own 79 percent of SuSu Developers own?

6 A I would say it's at least that figure.

7 Q So am I correct, then, in saying that 80 percent  
8 of SuSu, approximately 80 percent of SuSu, is owned by the  
9 same people that own approximately 79 percent of S. L. Nusbaum  
10 and Company?

11 A Not exactly, but you're not far off. Whether  
12 there's more of S. L. Nusbaum and Company stock owned by people  
13 who own SuSu than there are people who own SuSu and own  
14 S. L. Nusbaum --

15 Q In round figures that approximately is correct,  
16 is it not?

17 A I wouldn't debate that with you. I don't have  
18 the figures before me.

19 Q You had spoken of the time at which you were  
20 notified that St. Paul would no longer undertake the defense  
21 of S. L. Nusbaum, and at that time you indicated that you  
22 retained your own counsel; is that correct?

23 A Yes, we did.

24 Q And that counsel was the counsel that you have  
25 today? Hofheimer, Nusbaum, McPhaul, et cetera?

1 A If you would.

2 Q If the question isn't clear, please indicate  
3 to me and I'll try to clarify it. I was asking whether you  
4 would indicate that when you had been informed that there  
5 were certain things which the policy didn't cover, including  
6 property management, and that didn't concern you, what I  
7 was asking you is what percentage of your income, by your  
8 definition, would come under that exclusion?

9 A Well, if you will allow me the same privilege,  
10 I'd have to say to you that property management cannot result  
11 generally without leasing, and when you put it in the context  
12 you are putting it in, -- it includes income that has been  
13 derived as a result of leasing, leasing having been defined,  
14 and with that background, I would say to you that probably  
15 90 percent of our income comes from the leasing and property  
16 management of the commercial or apartment properties, with  
17 the bulk of that coming from the leasing and management of  
18 apartment properties.

19 Q Is there any way to define what percentage of  
20 that is attributable to the leasing function?

21 A In some instances there has been -- for example,  
22 we were paid a substantial fee for the leasing of a doctors'  
23 building on Kempsville Road in Norfolk for which we were hired  
24 as leasing agents. After the building was leased up, the  
25 doctors hired us to be their management agents. But the



1 agreement for the first two years was strictly a leasing  
2 agreement, and a substantial fee was earned from that. In  
3 your initial responses to Ms. Laibstain's question, you  
4 schematically diagramed what the organizational structure of  
5 S. L. Nusbaum and Company was by departments. Was that  
6 departmental structure overall the same in 1977?

7 A Yes.

8 Q And was it the same in 1979?

9 A The personnel may have varied, but the function  
10 as a department was the same.

11 Q And it would be the same case today?

12 A Yes.

13 MR. HOWELL: Your Honor, that's all I have  
14 at this time. I would reserve the right to recall Mr. Nusbaum.

15 Thank you, Mr. Nusbaum.

16 THE COURT: Anything else?

17 MS. LAIBSTAIN: Just a few more questions.

18 REDIRECT EXAMINATION

19  
20 BY MS. LAIBSTAIN:

21 Q Mr. Nusbaum, I just want to ask you a couple  
22 of questions about Mr. Doumar's representation of you. During  
23 the time that he was representing S. L. Nusbaum, did he ever  
24 say anything to you about the seriousness of the claim against  
25 S. L. Nusbaum by Mr. Brady?

\* \* \* TES

REGISTERED

REPORTERS

NORFOLK, VIRGINIA

DIRECT EXAMINATION

BY MS. LAIBSTAIN:

Q Good afternoon. Will you state your name for the record, Mr. Lindsay?

A Harvey Lindsay.

Q What's your occupation, Mr. Lindsay?

A I am a real estate broker.

Q And what's the name of your firm?

A Harvey Lindsay and Company.

Q What's the nature of the business that Harvey Lindsay and Company does?

A We have a commercial real estate brokerage company. We deal in shopping centers, office buildings, and general commercial leasing, management, sales, investment properties, and development.

Q How long have you been involved in this sort of business?

A Twenty-eight years.

Q Can you give us a little idea of your educational background?

A Well, I graduated from high school, and from the University of Virginia in 1951.

Q What aspects of the real estate business have you been personally involved in?

1           A       Well, really all aspects of the commercial  
2 business. In the leasing, property management, sales,  
3 development, the administration of the business.

4           Q       Are you a member of any real estate affiliated  
5 organizations?

6           A       Well, we are members of most. We are in the  
7 International Council of Shopping Centers, and we are a member,  
8 of course, of the Norfolk -- well, it's now the Tidewater  
9 Board of Realtors, and the Virginia Beach Association of  
10 Realtors, the National Association of Realtors, and we're in  
11 various appraisal institutes and management institutes, and  
12 things like that.

13          Q       Do you hold any licenses, or any special  
14 qualifications?

15          A       Well, just my real estate broker's license.  
16                   I have the professional designation of CSM,  
17 which is Certified Shopping Center Management. This is given  
18 by the International Council of Shopping Centers.

19          Q       What's the basis for that being granted?

20          A       Well, it's based upon your previous association  
21 in shopping center leasing and management, and you have to take  
22 an examination, a written exam, and then an oral examination  
23 with a group of people.

24          Q       Is that a perfunctory type of thing that everybody  
25 is granted?



1 A No, but there's no --

2 THE COURT: Let me interrupt a moment.  
3 Apparently you're trying to establish Mr. Lindsay's  
4 qualifications to ask him his opinion?

5 MS. LAIBSTAIN: That's correct.

6 THE COURT: In what field?

7 MS. LAIBSTAIN: In the field of real estate  
8 development, management, leasing.

9 THE COURT: Do you question his qualifications  
10 in that field?

11 MR. HOWELL: Your Honor, I don't question his  
12 qualifications.

13 THE COURT: Go ahead.

14 MS. LAIBSTAIN: Be glad to.

15 BY MS. LAIBSTAIN:

16 Q Are you familiar with the concept of property  
17 management and leasing?

18 A Yes, I think so.

19 Q Can you explain to us the two concepts?  
20 What property management means and what leasing means?

21 MR. HOWELL: May I take it that he is admitted  
22 as an expert witness?

23 THE COURT: She is asking his opinion now. Do  
24 you object?

25 MR. HOWELL: I would object to his opinion unless

1 he is to be qualified as some type of expert. I don't deny  
2 his opinion if she wants to qualify him as an expert.

3 THE COURT: She has at some length had him  
4 testify to his qualifications, to his education and  
5 qualifications. The term expert is a strange one that I  
6 rarely use. We don't declare them as an expert. We determine  
7 if the opinion may be evidence based upon the qualifications  
8 that have been established, and with your stipulation of what  
9 the qualifications are in the field, I would allow that  
10 question to be asked.

11 MR. HOWELL: All right. Fine.

12 BY MS. LAIBSTAIN:

13 Q Can you tell me what property management entails?

14 A Well, property management, our understanding of  
15 it, and the way we work it in our company, involves the  
16 administration of the lease after it's been signed. In other  
17 words, we feel that leasing and management are separate functions.  
18 There is, of course, some overlap, but normally leasing people  
19 do not do management functions. We have the leasing people who  
20 go out and search for tenants and try to put the tenants in  
21 the right store at the proper amount of rent and for the right  
22 terms. That's called leasing. Then once the lease is signed,  
23 we turn it over to our management department where at that time  
24 they administer the lease. They take care of any complaints  
25 that the tenant has, repairs, or anything of that nature, any

1 improvements that have to be made within the premises such  
2 as partitions or something, and that would be their  
3 responsibility to get the report of the sales of the tenant  
4 and collecting the real estate taxes and such as that.  
5 One is an administrative function and the other is an action-type  
6 thing, as I see it.

7 Q Based upon your experience and your knowledge  
8 in this area, is there a need for two separate departments  
9 to handle these two separate functions?

10 A Well, we think so, and I think for the most part  
11 in the industry today, that's the way to do it. That is the  
12 rule, not the exception. I think it's no question it works  
13 better that way. We find leasing people, really, if they  
14 get involved in management problems, they get bogged down and  
15 don't do the job properly. We like to keep them separate.  
16 They are two different types of individuals. A person could  
17 be very good in management and detail and follow-up, and  
18 yet not be good in actually negotiating leases.

19 Q Based upon what you said and your experience,  
20 would putting together of a prospective tenants in a unit in  
21 a commercial shopping center, say a restaurant unit, fall  
22 within a property management category, leasing category?

23 A You mean to find the tenant?

24 Q And put them in?

25 A That would be leasing, I think.



1 MS. LAIBSTAIN: Would you answer Mr. Howell's  
2 questions?

3 CROSS-EXAMINATION  
4

5 BY MR. HOWELL:

6 Q Mr. Lindsay, you do have management personnel  
7 to negotiate lease, do you not?

8 A Well, we try not to, Mr. Howell, if we can.  
9 Certainly we can. It's not absolutely clear-cut. Our  
10 policy is to have leasing people to do the leasing, and  
11 management people to do the management, but I can't -- I'd  
12 have to think back of any instances. I am sure there were  
13 some, where they did.

14 Q Let me ask you what you do if -- you testified  
15 you exclude leasing from property management. What do you  
16 include within property management? What function?

17 A Within property management?

18 Q Yes.

19 A The collection of the rents, the collection  
20 of any percentage rents that are due, overage rents, collection  
21 of any real estate taxes, increases or taxes, if they are  
22 prorated. Charges such as that. It would be the responsibility  
23 for them to get the sales reports from the various tenants,  
24 they would take care of any repairs that had to be done,  
25 any improvements that had to be made to the center, they

1 would periodically inspect the center to see that the lights  
2 are on, parking lots being cleaned properly, that the trash  
3 is being taken out, the potholes are being fixed, and things  
4 like that. That's the way we look at management as opposed to  
5 leasing.

6 Q Do you have any departments within your  
7 management property department, or division? Is it broken  
8 down any further?

9 A We have a shopping center leasing department,  
10 and then we have what we call, what we term, a property  
11 management department. We have a man who takes care of all  
12 the management details as such, and that's the name we give it.

13 Q Let me assume for the sake of argument, that  
14 the definition of property management includes what you say  
15 plus leasing. It would be nothing inconsistent with the  
16 definition by having various people perform those various  
17 duties, would it?

18 A I am not sure I understand your question.

19 Q Well, you indicated you broke property management  
20 down, and you have various people that perform that function.  
21 What I am asking you is if property management were to include  
22 leasing in all these functions, there would be no inconsistency  
23 by definition of the fact you might have someone doing the  
24 function of leasing and --

25 A You mean property management would include leasing?

1 Q A leasing man here and a management man here.

2 A I think that could be done if that's the way  
3 the company chose to do it.

4 Q Based on your experience, Mr. Lindsay, would  
5 you agree that Prentice-Hall Series, Guide To Real Estate  
6 License Examinations is an authoritative source in the  
7 real estate industry?

8 A Well, we don't use it, but I am sure it's okay.  
9 There are so many different real estate manuals and books  
10 and things that you can refer to. I've heard of Prentice-Hall.  
11 I am not sure I am very familiar with it.

12 Q Would you recognize it as an authority?

13 A I am not sure. I know I wouldn't dispute that,  
14 you know.

15 Q Let me read you a passage.

16 MS. LAIBSTAIN: I am going to object to the  
17 introduction of anything that hasn't previously been provided  
18 to counsel.

19 MR. HOWELL: Your Honor, there has been no  
20 request for any of this type of material. I simply propose  
21 to read the definition contained herein, and ask if he agrees  
22 with it.

23 THE COURT: You should establish a foundation  
24 based upon Mr. Lindsay's answers.

25 MR. HOWELL: He indicated that he did not disagree



1 that it was an authority.

2 THE COURT: Well, go on to the next one.

3 BY MR. HOWELL:

4 Q Mr. Lindsay, do you recognize Professor William  
5 Shenkel's book entitled, Modern Real Estate Principles as an  
6 authority?

7 A Well, I don't see how you can ask me that if  
8 I haven't read the book.

9 Q I am asking you if you do or don't?

10 A I don't know Mr. Shenkel, okay.

11 Q Okay. Let me ask you do you recognize  
12 Dr. Bruce Harwood's book called, Real Estate Principles,  
13 Second Edition, as an authority?

14 A I haven't read it, but I don't object to it.

15 Q I am just asking you if you recognize it as an  
16 authority?

17 A I have not read it.

18 Q May I ask you about the ninth edition of Alfred  
19 Ring's Real Estate Principles and Practices? Do you recognize  
20 that?

21 A No, I have not read that.

22 Q Are you, either you or your organization, a  
23 member of the Institute of Real Estate Management?

24 A Yes.

25 Q Let me ask you if you are familiar with a book

1 by James C. Downs, Principles of Real Estate Management,  
2 which was published by the Institute of Real Estate  
3 Management?

4 A. Yes, I am.

5 Q. Would you recognize that as an authority?

6 A. Yes.

7 MR. HOWELL: Your Honor, I assume Linda  
8 Laibstain has the same objection.

9 THE COURT: She hasn't made it.

10 MS. LAIBSTAIN: I am going to object to this.  
11 It has not been previously furnished to the plaintiff, and  
12 we have asked for all guidelines having to do with this  
13 distinction.

14 THE COURT: Is it your position that it was  
15 called for in some sort of pretrial procedure?

16 Let's excuse the jury temporarily, please.

17 (The jury was excused from the courtroom.)

18 THE COURT: Now, what's your point,  
19 Ms. Laibstain?

20 MS. LAIBSTAIN: On the initial interrogatories  
21 to the defendant, number four and five, plaintiff has asked  
22 for St. Paul's definition of property management and the  
23 basis upon which it arrived at the definition. Now, in the  
24 request for production we asked for all other documents  
25 identified in Answers to Interrogatories not already produced.

\* \* \*

CIATES

REGIS

JONAL REPORTERS

NORFOLK, VIRGINIA

1 irrelevant and perhaps misleading information to be given to  
2 the jury and only later to have to tell them to disregard it.  
3 It seems to me what we're talking about here is the usage in  
4 the trade of certain materials and what activities within that  
5 general field of real estate operation fall within one  
6 activity and what falls within another.

7 Mr. Lindsay has given quite clear evidence as  
8 to what he and his attorney consider what is, and what is not.

9 Where I am left right now is not knowing whether  
10 his company follows the general usage of the trade in this  
11 company, or whether it's unique to his company. I don't know  
12 what the passage is that you intend to refer us to in this  
13 book that Mr. Lindsay does have respect for pertaining to  
14 the Tidewater area or Chicago or both. I don't want to get  
15 too far into something only to find out later, to have to tell  
16 the jury to disregard it, so I would ask you to develop this  
17 line of questioning with some caution.

18 (Recess)

19 THE COURT: Are we ready to proceed?

20 MR. HOWELL: Yes, Your Honor.

21 THE COURT: Recall the jury, please.

22 (The jury was returned to the courtroom.)

23 THE COURT: Mr. Howell.

24 BY MR. HOWELL:

25 Q Mr. Lindsay, before we recessed, you were



1 discussing Mr. Downs' book called Principles of Real Estate  
2 Management, and you indicated that you recognized it as an  
3 authority in the field, did you not?

4 A Yes.

5 Q I have here the 1976 edition or 1975 edition.  
6 I'm sorry. Please listen to the following passage I will  
7 read you, and tell me whether you agree or disagree with the  
8 statement, and if so, why or why not.

9 "In the last chapter of this book we will be  
10 talking about those activities and functions of  
11 property management that belong to the  
12 administrative process of his business. Of  
13 course, the central part of what a property  
14 manager does involves marketing, and that is  
15 why some of the preceding chapters have been  
16 devoted to it. Unless there is, after all, there  
17 will be no cash flow to justify the business,  
18 hence no business to administrate."

19 Would you agree or disagree with that passage?

20 I am speaking primarily of the section that runs, "The central  
21 part of what a property manager does involves marketing."

22 A I certainly can't dispute what he says. We just  
23 happen to keep the two things separate. But I certainly can't  
24 dispute what you said.

25 Q Then, in the twelfth edition, which was published

1 in 1980, I would like to read you this passage, and again  
2 ask you the same question. The sixth chapter on marketing  
3 and leasing, page 129:

4 "Renting Techniques"

5 "Renting is a process of interesting  
6 prospects once they have been given the opportunity  
7 to rent it. The desire to rent results from the  
8 property manager maximizing the value of the  
9 space then convincing prospects of this value.

10 "Negotiating a lease requires the manager to  
11 stress how a given space satisfies the  
12 prospective tenant's needs."

13 A. Again, I can't dispute that. If I was writing  
14 the book, I wouldn't call him a property manager. I would  
15 call him a leasing man. But I can't dispute what he says.

16 Q And lastly, the same chapter, page 137, under  
17 summary, a passages states:

18 "Property managers consider marketing a  
19 significant management activity. Merchandizing  
20 of techniques vary among property types; however,  
21 marketing strategies depend on a building's size  
22 location, and age. Property managers often turn  
23 to advertising to introduce rental to market."

24 A. That's true. I would like to add one thing,  
25 if I can. I think that Mr. Downs, in his book, is more attuned

1 probably to apartments than to shopping centers, and I  
2 think he's referring more to the residential part of the  
3 business in the management and leasing than he is in shopping  
4 centers. In other words, I don't think that's the rule in  
5 shopping center and office building leasing, but I could be  
6 wrong.

7 Q In that regard, let me refer you to the index  
8 of the book, if you care to see it. Chapter 13, Shopping  
9 Centers and Retail Properties, which is Section 1.

10 A I know he covers that in there. I guess what  
11 I am trying to say, I think his definition is mainly for  
12 residential property management, but, again, I could be wrong  
13 about that. We do it differently in our company, and I  
14 think most other companies now recognize the division between  
15 the two. I think that anyway.

16 Q Let me ask you what the Institute of Real Estate  
17 Management is?

18 A It's a professional organization of the National  
19 Association of Realtors. It's composed -- you have to be a  
20 member of the National Association of Realtors. You have to  
21 be a member of the local, Tidewater Board of Realtors, and  
22 it's a professional organization of people who get what they  
23 call their CPM designation, which is Certified Property  
24 Management designation, and that's done after going to several  
25 schools and taking a comprehensive exam.



Q Is that a nationwide organization?

A Yes.

MR. HOWELL: Thank you.

THE COURT: Anything further? Does that conclude your examination?

MR. HOWELL: Yes.

MS. LAIBSTAIN: Just a few questions.

REDIRECT EXAMINATION

BY MS. LAIBSTAIN:

Q Mr. Lindsay, referring to the Institute of Real Estate Management, have you ever served as an officer?

A No. I am not a Certified Property Manager. We have some in our company, but I am not personally involved.

Q How about the Tidewater Board of Real Estate Management?

A I was president of the Norfolk Board of Realtors, many years ago, which is now the Tidewater Board of Realtors.

Q Who are the major property managers in this area?

A I think Goodman, Segar, Hogan; S. L. Nusbaum; Pembroke Commercial Realty, and our company. I think Adam McCabe and Lester to a smaller extent. They are growing, but I would say they are the major ones. Great Atlantic, but mainly in the apartment field, and to a smaller extent in the

1 office building field.

2 Q Are you aware of whether any of these  
3 organizations are set up any differently than what you  
4 described as far as separate departments?

5 A It's my understanding that they are set up  
6 pretty much the same way we are. I can't absolutely be sure  
7 about that, but it's my understanding it's pretty much that  
8 way.

9 Q Do you know of any major properties in the  
10 Tidewater area where one firm serves as a leasing agent and  
11 another as property manager?

12 A The new Royster Building. I am not sure what  
13 they call it now. It's next to VNB, where Royster has a  
14 headquarters. At one time it was managed by Goodman, Segar,  
15 Hogan and leased by Pembroke Commercial Realty. Of course,  
16 we handle -- we are involved in the leasing of fourteen  
17 shopping centers, of which nine we manage and five we do not  
18 manage. So you do have situations where sometimes an owner  
19 prefers to manage his own property and wants somebody else  
20 to do the leasing. The Royster Building situation is unusual,  
21 but it was a situation that existed.

22 Q Are there different types of personalities for  
23 the different jobs?

24 A I sort of feel that way. Some people don't like  
25 to get involved in the detail of taking care of management

1 problems. Management is so detailed. It's so intensified  
2 with detail work, follow up, and things like that. It's a  
3 tough business. All the real estate business is tough, but  
4 that's particularly tough. It's difficult. I think it  
5 requires two different kinds of people, you know.

6 Q Do you look for different kinds of people?

7 A Yes, we do. We try to.

8 Q You said something about the distinction between  
9 the residential property management and commercial property  
10 management. What do you mean when you say residential, and  
11 what do you mean by commercial?

12 A In residential I am referring to apartment units,  
13 garden apartment units, and I suppose you could say single-  
14 family houses because that's getting to be a large part of  
15 the business, but mainly garden-type apartments, garden  
16 apartment-type units.

17 MS. LAIBSTAIN: Answer Mr. Howell's questions.

18 RECROSS EXAMINATION

19  
20 BY MR. HOWELL:

21 Q You are referring to the structure of other  
22 organizations, realty organizations, of which you are familiar?

23 A Yes.

24 Q There is nothing inconsistent with the  
25 departmental definition of Mr. Downs' definition of property



1 management, is there? What I'm asking you is there's  
2 nothing inconsistent with the definition of property  
3 management which includes leasing whereby you have two people  
4 doing all those functions as opposed to one?

5 A No, I don't think so.

6 Q Let me ask you if the local real estate  
7 industry generally follows the trades and practices of the  
8 national industry?

9 A Well, that's hard to say. For instance, in  
10 other cities, at least in the larger cities, in leasing  
11 they pay you a commission up front like they do in sales,  
12 whereas in management, they pay you a certain fee over a  
13 period of time that you are managing. In this area we don't  
14 do it that way. There are differences. There are differences  
15 in the various parts of the industry, you know. There really  
16 are. There are some differences.

17 Q Would you say that the local industry follows  
18 the general trend of the national industry?

19 A I would say so for the most part, but there are  
20 differences.

21 MR. HOWELL: Nothing else.

22 THE COURT: Ms. Laibstain.

23 MS. LAIBSTAIN: Nothing else.

24 THE COURT: Thank you. You may be excused.

25 (Witness excused)

1 THE COURT: Mr. Howell.

2 MR. HOWELL: Yes, Your Honor. I have a couple  
3 of motions I would like to take up with the Court at this  
4 time.

5 THE COURT: The jury is excused.

6 (The jury was excused from the courtroom.)

7 MR. HOWELL: Your Honor, at this time on behalf  
8 of the defendant, we move to strike the plaintiff's evidence  
9 with regard to count one and two of the amended motion for  
10 judgment.

11 Count one, on the ground--I believe the  
12 evidence has indicated, and we have relied on, three exclusions  
13 in this policy. The first dealing with a property management  
14 and property management agreement, or a situation in which  
15 S. L. Nusbaum was acting in a supervisory capacity for the  
16 building owner. We think Mr. V. H. Nusbaum's testimony, as  
17 to the activity which they did out there, leasing and managing  
18 the property, put them in a supervisory capacity, and that this is the  
19 role in which the rental occurred. The second exclusion is  
20 for management of property under which the misrepresentation  
21 occurred. The second exclusion is for management of property  
22 which is developed, owned, or constructed by a parent firm  
23 under the same financial control as the insured.

24 I don't think there's any question about the  
25 latter part. However, it's been admitted that the people who



1 owned, the same people who owned eighty percent of the stock  
2 of S. L. Nusbaum also owned SuSu Developers, which is the  
3 owner of Hilltop North Shopping Center.

4 We believe that both a common definition of  
5 the word, and also as it is defined in the real estate  
6 industry, is that leasing is a property management function.

7 The third exclusion deals with any situation  
8 in which the insured acts as a member, partner, joint or  
9 coventurer, in a real estate partnership, syndicate, and  
10 so forth. As we indicated, first of all, the option on this  
11 property ran to S. L. Nusbaum and Company. That option  
12 indicates clearly in there that it can be assigned to anyone  
13 as long as the assignees are the same participants as those  
14 people who are principals of S. L. Nusbaum and Company. Mr.  
15 Nusbaum testified that his understanding of the contract was  
16 that the people who were leasing the property for  
17 development were leasing through the principals of S. L.  
18 Nusbaum and Company, and whatever form they took after that  
19 was immaterial as long as those principals of S. L. Nusbaum  
20 were involved, and in addition to which, he has admitted that  
21 SuSu Company, which is a general partner in SuSu Developers,  
22 is a wholly-owned subsidiary of S. L. Nusbaum.

23 We think, in light of those descriptions, that  
24 they were acting as a member of the real estate partnership  
25 indicated, and were, in fact, developing the property and owned it.



1 "...arise out of or in connection with the  
2 management or sale," right?

3 MR. HOWELL: Yes, sir.

4 THE COURT: All right. And then the third  
5 exclusion which you relied on is that which excludes claims  
6 arising "out of or in connection with any Insured's activities  
7 as an underwriter, sponsor, partner, joint or co-venturer or  
8 any member in any real estate partnership,..." and so  
9 forth.

10 Those are the three exclusions that you are  
11 relying on?

12 MR. HOWELL: Yes, sir.

13 THE COURT: Now, the policy contract of the  
14 company provides that it extends coverage, and its obligation  
15 is to pay on behalf of the Insured all sums which "the  
16 Insured shall become legally obligated to pay as money damages  
17 (other than exemplary or punitive damages), because of any claim  
18 or claims first made against the Insured during the policy  
19 period, arising out of any negligent act, error or omission,  
20 occurring subsequent to the retroactive date," and here's the  
21 key language: "in the conduct of the Insured's business as  
22 real estate agents, and caused by the Insured or some other  
23 person for whose acts the Insured is legally liable, except as  
24 excluded." So, your agreed coverage under this contract is  
25 claims arising out of negligence and errors or omissions in the

1 conduct of the insured's business as real estate agents. It  
2 seems to me that the business of a company as a real estate  
3 agent necessarily includes the negotiation of leases, and  
4 unless there is an exclusion which would expressly take that  
5 activity out of the coverage, then it's still in there.

6 If we construe the word management to include that, then my  
7 question would be what's left?

8 MR. HOWELL: A number of things are left, Your  
9 Honor. The application, which is in evidence, makes it clear.  
10 First of which is sales; second of which is real estate  
11 consultation; the third of which is real estate appraisal.

12 THE COURT: Well, I have real trouble with that,  
13 and I would say to you that on its face it would appear to me  
14 that one acting as a real estate agent, attempting to negotiate  
15 the lease for another, would clearly be covered by that  
16 coverage provision unless one of the exclusions takes it out.  
17 Do you agree with that?

18 MR. HOWELL: Yes, sir.

19 THE COURT: Now, the mere fact that the same  
20 company might have certain management responsibilities or  
21 might sell or might repair or might do other things or might  
22 even share ownership and so forth, that fact wouldn't change  
23 that. Unless they change that, then it would not bring the  
24 type of claim that we have here within an exclusion, unless  
25 that claim arose out of those circumstances, and you're not



1 taking the position that if Nusbaum performs certain management  
2 functions then they are not covered on this claim. You  
3 would have to say that this claim arose out of management  
4 functions, would you not, in order for it to be excluded?

5 MR. HOWELL: For it to be excluded the management  
6 of property would have to entail either the general definition  
7 of the standard, the intention of the parties, or by the  
8 standard of the industry.

9 THE COURT: All right, sir. There would have  
10 to be a claim that, "arises out of or in connection with  
11 operations performed by the insured under a written management  
12 agreement or any situation where the insured acts in a  
13 supervisory capacity for a building owner." What does that  
14 mean?

15 MR. HOWELL: A building owner.

16 THE COURT: Does every real estate agent who  
17 represents the owner of a building negotiating a lease with  
18 a prospective tenant, are you saying he is acting in a  
19 supervisory capacity?

20 MR. HOWELL: I don't see that on a general basis.  
21 I think certainly in this case they were, which is the case  
22 as we have determined it.

23 THE COURT: Why?

24 MR. HOWELL: Because, Your Honor, they had  
25 absolute control, in essence, of what went on at Hilltop North.



1 They leased it, and they maintained it.

2 THE COURT: In this activity here they are  
3 sitting down to negotiate a lease with a prospective tenant,  
4 which is a part of a many-faceted business. But that's the  
5 operation, or the activity, out of which this claim arose.  
6 There's no question about this claim arose out of that  
7 activity?

8 MR. HOWELL: The error was a leasing error.

9 THE COURT: If they acted in a supervisory  
10 capacity in other respects, but not acting in a supervisory  
11 capacity in that activity, then that does not pertain?

12 MR. HOWELL: That's correct.

13 THE COURT: How was Mr. Goldmeier's activities  
14 in negotiating as a real estate agent this prospective lease  
15 with the tenant different from any other real estate agent  
16 who is trying to negotiate a lease?

17 MR. HOWELL: In this case they had complete  
18 control over the property, and they were overseeing it. I  
19 think the general definition of supervisory capacity is to  
20 oversee, manage, and control.

21 THE COURT: But the claim doesn't arise out of  
22 their overseeing or over their supervising. The claim arises  
23 out of the negotiations of the lease, and unless in that activity  
24 they were acting in a supervisory capacity for the building  
25 owner, then the exclusion doesn't pertain in this case.

1 MR. HOWELL: If you do not consider leasing  
2 to be supervision, then it does not pertain there.

3 THE COURT: I think if I was the owner of  
4 a building and I asked a real estate agent to lease it for  
5 me and he negotiates with somebody for the lease, in the  
6 course of that he is just acting as my agent.

7 MR. HOWELL: I think the evidence clearly was  
8 in this case what services were purchased and what services  
9 were performed was a package. There was no breakdown between  
10 saying you received "X" amount for leasing and "X" amount  
11 for maintenance. What they were purchasing was a total  
12 supervisory package consisting of maintenance, insurance,  
13 and leasing.

14 THE COURT: I think that's where you and I  
15 are running into trouble, though, because by your contract,  
16 which you drew, you didn't say that there would be no  
17 coverage if under any activity -- if that type of  
18 relationship or that type of package deal was entered into.  
19 You didn't say that. You said there would be no coverage  
20 for claims arising out of the acts in that particular category.  
21 Now, there could be five million of them, but unless the  
22 claim arose out of an act of management, or any act which the  
23 insured was acting in a supervisory capacity, then it wouldn't  
24 be excluded. I am not denying that under the evidence that  
25 they might have, in some respects, acted, but this claim didn't

1 arise out of anything more than negotiation of a lease.

2 That's my problem with it, and as I see it that's my problem  
3 with every one of the exclusions.

4 The mere fact that they might have had a  
5 partnership, that they might have not had a partnership,  
6 but might have been overlapping control or ownership, all  
7 those things do not preclude the coverage, otherwise. I  
8 don't think you have any policy left at all. But you have  
9 covered claims arising out of acts, errors of omissions in  
10 the conduct of the insured's business as real estate agent.  
11 I can't think of anything more basic to the business of a real  
12 estate agent than negotiating a lease. Then where you exclude  
13 certain claims arising out of certain operations, and in  
14 other respects for certain activities, no other respects,  
15 but just have said that you exclude claims arising out of  
16 leasing or negotiating leases as a part of the business of  
17 real estate, as a real estate agent, I seriously question  
18 whether you have a basis for your denial in this case.

19 At any rate, it prompts me at the time, certainly,  
20 to overrule your motion on count one, and since that's overruled,  
21 you can go on to count two.

22 MR. HOWELL: Please note my exception.

23 THE COURT: Your exception will be noted and  
24 we'll take a brief recess.

25 (Recess)



1 THE COURT: Please recall the jury.

2 (The jury was returned to the courtroom.)

3 THE COURT: Call your first witness.

4 MR. HOWELL: Dr. Jon Crunkleton.

5 THE COURT: Were you sworn earlier?

6 MR. CRUNKLETON: No, sir.

7  
8 DR. JON CRUNKLETON, called as a witness by and  
9 on behalf of the defendant, after having been first duly  
10 sworn, was examined and testified as follows:

11 DIRECT EXAMINATION

12  
13 BY MR. HOWELL:

14 Q Dr. Crunkleton, will you state your name and  
15 address?

16 A Yes, Jon R. Crunkleton, 4783 Darby Court,  
17 Virginia Beach, Virginia.

18 Q Would you spell that please?

19 A C-r-u-n-k-l-e-t-o-n.

20 Q Thank you, sir. What is your occupation?

21 A Assistant professor of finance and real estate  
22 at Old Dominion University.

23 Q Will you describe, for the Court, your academic  
24 background?

25 A I have been teaching real estate courses for

1 approximately six years. I have a PhD. in real estate and  
2 marketing from the University of South Carolina.

3 Q Do you belong to any real estate organizations?

4 A I am an officer in the American Real Estate  
5 and Urban Economic Association, which is an association of  
6 college professors in real estate. I am a consultant with the  
7 Tidewater Board of Realtors, a member of the American Marketing  
8 Association.

9 Q Have you written any articles in the real estate  
10 industry?

11 A I have written several articles for appraisal  
12 magazines and journals. I have had several articles in the  
13 American Real Estate Urban and Economic Association Journal,  
14 and Tax Review, and Tax Assessors Journal.

15 Q Outside the academic community, do you have any  
16 relationship to these organizations? Do you have any real  
17 estate-related activities?

18 A I am a principal of a small firm located out  
19 in Virginia Beach, Realty Advisors, Incorporated. We do market  
20 analysis, feasibility studies, design computer hardware and  
21 software for real estate firms, and we do studies, investment  
22 analyses, for firms in the area.

23 Q Would you tell me some of the organizations with  
24 which you -- clients that you've served in this capacity?

25 A Would you repeat the question?

1 Q Tell me the real estate organizations, or firms  
2 in the area which you have served in this capacity?

3 A I have done consulting work for Harvey Lindsey  
4 and Company; my firm has done work for Goodman, Segar, Hogan;  
5 we've done some work for the City of Virginia Beach, and  
6 other individual investors.

7 Q Dr. Crunkleton, based upon your educational  
8 background and experience in the real estate industry, will  
9 you define for me the term property management?

10 MR. NUSBAUM: I don't believe this witness has  
11 been qualified as an expert on property management from  
12 anything that he has said. I don't think he has said he  
13 engaged in property management or consulted on property  
14 management. Market studies and analyses, the things that he  
15 has spoken of in connection with the real estate industry,  
16 are not the same as property management. I haven't heard  
17 Mr. Howell ask him a single question about property management,  
18 or his participation or background in it. I object to the  
19 question.

20 THE COURT: Let me see if I understand exactly  
21 where we are after hearing Dr. Crunkleton's educational and  
22 professional experience. The question was not put to him as  
23 to his opinion on something, but rather asking him to define  
24 a certain word. Perhaps that's the same thing by a different  
25 phraseology. Your objection goes to his qualifications to offer



1 his opinion as to the meaning of that term?

2 MR. NUSBAUM: Yes, sir.

3 THE COURT: Not to the question itself, but  
4 to his qualifications as developed up to this point; is that  
5 right?

6 MR. NUSBAUM: As an expert.

7 THE COURT: Would you like to interrupt at this  
8 time and cross-examine on the area of qualifications?

9 MR. NUSBAUM: Yes, sir.

10 THE COURT: All right. I will allow you to do  
11 so.

12 VOIR DIRE EXAMINATION

13  
14 BY MR. NUSBAUM:

15 Q Dr. Crunkleton, do you hold a Virginia real  
16 estate license as a broker?

17 A No, sir, I do not.

18 Q As an agent?

19 A No, sir, I do not.

20 Q Do you hold a real estate license in any state?

21 A No, sir.

22 Q Have you ever actively engaged as a real estate  
23 agent or broker?

24 A Without having a license, I cannot.

25 Q So you never have?

1 A No, sir.

2 Q Are you familiar with the structure, the  
3 departmental structure, of the firms that engage in real estate,  
4 the larger firms that engage in the real estate business in  
5 this area?

6 A I am generally familiar with Goodman, Segar,  
7 Hogan, Harvey Lindsay and Company; and S. L. Nusbaum only in  
8 a general manner. I have had several students who are working  
9 in some capacity, who I have conferenced since their graduation.

10 Q No personal contact or conferences conferring with  
11 the principals about those particular matters as distinguished  
12 from these?

13 A Correct.

14 Q When you speak of making a market analysis or  
15 survey, you are talking in terms of whether a particular  
16 parcel of real estate, say a 20-acre tract, has the strategic  
17 potential, has the strategic growth potential and the number  
18 of people with certain characteristics and buying habits  
19 living within a certain range of that area? That's the type of  
20 survey you're speaking of?

21 A Essentially that's correct.

22 Q That's the type of service you render for  
23 Goodman, Segar, Hogan and Lindsey; is that not so? To determine  
24 the suitability for a piece of property for development?

25 A Different clients request different things, but

1 generally in that area, yes.

2 Q Have you consulted with any firm in this area  
3 as to how it should structure its operations, and how it should  
4 organize its departments? In your professional capacity do  
5 you advise them how to run their business?

6 A No, sir.

7 MR. NUSBAUM: I would submit that --

8 THE COURT: Do you have any further questions  
9 on the subject of qualifications, Mr. Howell?

10 MR. HOWELL: Yes.

11 DIRECT EXAMINATION (Cont'd.)

12  
13 BY MR. HOWELL:

14 Q Dr. Crunkleton, you have a PhD. in real estate?

15 A Yes, sir.

16 Q In the course of your education, did you receive  
17 any education in regard to property management?

18 A Yes, sir. At one time I was scheduled to  
19 teach a course in property management. However, the course  
20 did not materialize and the course was not taught. I also,  
21 in my courses, have had student property managers.

22 MR. HOWELL: Your Honor, I think in light of  
23 those responses he is qualified. The fact that -- and I submit  
24 it has no bearing on this case -- he is not familiar with  
25 exactly how this client, or this plaintiff, or any given



1 individual, divides their departments and divides the functions,  
2 it has nothing to do with the overall definition of property  
3 management.

4 THE COURT: We'll excuse the jury temporarily.

5 (The jury was excused from the courtroom.)

6 THE COURT: Of course, Dr. Crunkleton, with  
7 his education and professional experience, is qualified to  
8 offer opinions in response to appropriate questions and within  
9 the limits of his field.

10 I have some difficulty with the question itself.  
11 If you are asking the witness to advise the Court how the  
12 Court should construe a term for the contract which is in  
13 issue before the Court, I question whether that is allowable.  
14 You don't put witnesses on the stand to tell the Court what  
15 it's decision should be on a question of law. I want to hear  
16 from you gentlemen on that. I would also like to hear from  
17 you further on whether the particular question that has been  
18 put to Dr. Crunkleton does lie within his field of expertise  
19 in light of the responses he made to Mr. Nusbaum's questions.

20 MR. HOWELL: Your Honor, if the form of the  
21 question is what is troublesome, I would be happy to rephrase  
22 it as to what his opinion is. I think it's extremely relevant  
23 in this case. If there is a general understood definition of  
24 property management in the industry, I think S. L. Nusbaum  
25 is bound by it, and I think, in light of what Dr. Crunkleton

1 said in light of his educational background and experience,  
2 and the fact that he is a professor who at one time was  
3 educated and trained to teach a property management course,  
4 that he is in a position to say what his opinion is based on  
5 by education and background in generally obtaining the  
6 understanding of the phrase in the real estate industry  
7 just as Mr. Lindsey is.

8 I hope I have answered that. If the problem  
9 is with his usurping the Court's role, from saying this is  
10 the definition, I would be happy to rephrase it. I think he  
11 is entitled to offer his opinion as to the general definition  
12 of that term, as it is understood in the real estate industry.

13 THE COURT: Your alternative question would  
14 be what activities fall under the term management, and what  
15 activity falls under the term leasing, or whether leasing  
16 falls under the general term managing? Is that what you  
17 propose to ask him?

18 MR. HOWELL: I had intended to lead him in  
19 that regard, or phrase it in that respect. I basically wanted  
20 to ask him what his opinion was of the definition of property  
21 management as it's understood in the real estate industry.

22 THE COURT: Mr. Nusbaum.

23 MR. NUSBAUM: If Your Honor please, I have the  
24 same difficulty as the Court in having the issue before the  
25 Court decided by the witness rather than by the Court. Since



1 it is a question of law, and I think the Court's position on  
2 that is entirely sound, I do not see how that question can be  
3 answered in terms of what any witness thinks about the meaning  
4 of the words.

5 It seems to me the issue is how are these  
6 companies, that are doing the work in this community where the  
7 insurer is selling his product, structured and whether the  
8 leasing activity is separable from the managing activity in  
9 terms of practice of the people that they are insuring, and  
10 whether the company can, or reasonably should, know that.  
11 I don't see how this witness is going to shed any light in  
12 terms of his own acknowledgement, that he had not discussed  
13 this with the principals of any of these firms, who we know  
14 through Mr. Lindsay's independent testimony that would be the  
15 firms involved -- the four or five leading firms, companies. He  
16 has not engaged in property management ever, he is not a  
17 licensed broker, and he has not consulted on this question with  
18 anyone, and the fact that he might have been prepared to teach  
19 it at one time seems to me is not going to furnish him with the  
20 basis for offering any opinion which the Court could receive  
21 as evidence. I respect Dr. Crunkleton, and I am sure that he  
22 is a fine professor. But I don't think his particular expertise  
23 and knowledge has been shown to qualify him to have an opinion  
24 this question.

25 MR. HOWELL: Your Honor, may I make one more point



1 back to the same distinction, which I submit Mr. Nusbaum is  
2 making based on how someone decides to divide whatever they  
3 are doing into departments. In his definition he seems to  
4 say that the definition standard is to be taken by what people  
5 do as far as regimenting, or departmentalizing, their real  
6 estate agencies. I submit, first of all, that isn't the  
7 standard. I submit that Dr. Crunkleton is qualified to say  
8 based -- there has got to be, and I submit that there is,  
9 a definition which is generally understood of property  
10 management in the real estate industry. I would assume, if  
11 the Court is going to decide that issue, you could, perhaps,  
12 ask for briefs on that point. I don't think he is usurping  
13 the Court's function in indicating what in the trade usage of  
14 that is generally understood to mean. I don't think I  
15 understood the Court to say that the Court would simply define  
16 the word based on the Court's sole past experience. I  
17 don't mean to imply the Court isn't qualified. I am sure  
18 the Court would seek the definition of the words as used in  
19 the policy.

20 THE COURT: Generally speaking, where controversy  
21 and a lawsuit arises under a written contract and the terms  
22 are there, even if one party or the other was called to the  
23 witness stand and asked what do you mean by such and such, we  
24 determine that parol evidence, his opinion, or his thoughts,  
25 subjective thoughts, would not be admissible. The contract

1 speaks for itself, and it must be construed in the light of  
2 its own language. If you get to the point where you find  
3 an ambiguity in the language of the contract itself, and it  
4 is necessary to construe, then, under certain circumstances  
5 expansive evidence is admissible to describe the circumstances,  
6 perhaps under which the contract was entered into, or perhaps  
7 even to describe usage in the trade of certain terms. I  
8 don't think the witness is allowed to say that proper definition  
9 of a term or usage of a term by the Court must be thus and so  
10 in a written contract. I think that the witness, as Mr.  
11 Lindsay was allowed to do without objection, can, if he has  
12 knowledge, testify to usage in the trade if we have an  
13 ambiguity. I believe that we do have an ambiguity in the  
14 broad sense, at least in that we have in the coverage clause  
15 that he assumed the obligation on the part of the insurance  
16 company to cover the actual period referred to which arose  
17 out of and performed in the conduct of the insured's business  
18 as real estate agents. That's very, very broad, and would  
19 certainly, as I think we have already agreed, include acts  
20 in the conduct of negotiating a lease on behalf of a property  
21 owner with a tenant.

22 We have an exclusion as to acts arising out of  
23 or in connection with the management or sale. It does not  
24 say negotiated leases specifically, but management or sale  
25 of property developed, and it is defendant's position that the



1 exclusion of acts arising out of management takes it out  
2 of the coverage of this policy, the acts of negotiating a  
3 lease of the tenants.

4 It depends then on what is meant by management.  
5 It becomes ambiguous in that it appears on the face to be  
6 in conflict, or possibly in conflict, with the coverage  
7 proposed. I do not believe the question as put, please define  
8 such and such a word in this contract, is proper, and the  
9 objection will be sustained to that.

10 I believe to that extent Dr. Crunkleton has  
11 the knowledge, and we'll simply have to rely on his own  
12 self-restraint in limiting himself to his own knowledge.  
13 There's no reason for us to feel that he won't. He would be  
14 permitted to testify to the usage of the terms in trade here,  
15 the term management in practice, what does that include, that  
16 sort of thing, just as Mr. Lindsay did, I think, within those  
17 same limits of concern and within also the limits of the  
18 witness' own knowledge of the practices in this area.

19 I believe to that extent that it's been opened  
20 by the plaintiff, by his own expert, and simply to respond  
21 with another witness dealing with the same subject in the same  
22 areas would be appropriate. It should be understood. Is  
23 that understood, Doctor?

24 THE WITNESS: Yes.

25 THE COURT: To that extent, then, the objection



1 would be overruled, but the testimony would be permitted  
2 only within those limits, and actually right now I don't  
3 know what the doctor's knowledge is of those practices in  
4 the various companies in this area and the usage of the trade.  
5 But that is what remains to be determined.

6 Recall the jury.

7 (The jury was returned to the courtroom.)

8 BY MR. HOWELL:

9 Q Doctor, based upon your education and experience,  
10 would you give me your opinion as to what the practice  
11 "property management" means in the general real estate industry?

12 MR. NUSBAUM: Objection.

13 THE COURT: Objection sustained.

14 BY MR. HOWELL:

15 Q Doctor, based upon your education, please  
16 indicate to me your opinion as to what is encompassed within  
17 the phrase property management?

18 MR. NUSBAUM: Objection. Same question.

19 THE COURT: Seems to be exactly the same  
20 question, and completely inconsistent with the ruling of  
21 the Court. Can you inquire of the doctor as to what his  
22 knowledge is of the practices of companies in this area, or  
23 something within the limits of the parameter that the court  
24 has defined as appropriate? Not just theoretical, a strict  
25 question as to what amounts to his definition of the word.

1 That's exactly what we've already dealt with.

2 MR. HOWELL: Your Honor, I didn't understand  
3 the Court's ruling to limit his testimony solely to this  
4 area.

5 THE COURT: Well, I don't really mean to be  
6 emphasizing that because I have no reason to think that usages  
7 in this area are different from usages elsewhere except to  
8 the extent that some witness said they are different. I  
9 don't mean to be emphasizing the geography of it, but I  
10 think your inquiry would have to do with practices and  
11 experiences and not ask the witness to define a word in the  
12 contract which is up to the Court to construe.

13 BY MR. HOWELL:

14 Q Let me ask you, Dr. Crunkleton, based upon  
15 your education and your experience with practices of the  
16 industry, what practices and functions would be encompassed  
17 within property management based solely on your education and  
18 experience?

19 MR. NUSBAUM: Your Honor, I object to that  
20 question.

21 THE COURT: Objection overruled.

22 THE WITNESS: Can I answer this one?

23 BY MR. HOWELL:

24 Q Yes.

25 A As I understand your question, based strictly

1 on education and not my conversations with people in the area?

2 Q Yes.

3 A Okay. If I were teaching a class on the  
4 principles of real estate, I would define property management --

5 MR. NUSBAUM: Excuse me. The witness is going  
6 to offer a definition, and I have to object.

7 THE COURT: I don't think that's the question put  
8 to you. Do you want the question again?

9 THE WITNESS: Yes.

10 THE COURT: That question is what practices  
11 would fall within that term of management. It doesn't ask  
12 for your definition of the word from your experience and  
13 education and qualifications to that extent. Just what  
14 practices fall within the term management?

15 THE WITNESS: I would say first, managing of  
16 space would include leasing, tenant selection, insuring the  
17 property, property maintenance, advertising and promotion.

18 MR. HOWELL: That's all I have, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. NUSBAUM:

21 Q Dr. Crunkleton, are you familiar with the fact  
22 that the major real estate firms in this area that handle  
23 commercial property have a leasing department which is separate  
24 and distinct from the property management department?  
25



1 A Yes, sir.

2 Q And that is a fact known to you, isn't it?

3 A Yes, sir.

4 Q And there are good, sound reasons for that,  
5 are there not?

6 A Yes.

7 Q Are there some firms that have some properties  
8 where a real estate brokerage firm may only be leasing and  
9 not do management; is that not correct?

10 A I can't say that's correct, or not.

11 Q You mean you don't know it?

12 A I do not know.

13 Q You do not know, but if Mr. Harvey Lindsay said  
14 they were so, you would believe him?

15 A I would believe him, yes.

16 Q Are you familiar with the fact that the Royster  
17 Building downtown here in Norfolk, next to the Virginia  
18 National Bank Building, and I believe recently acquired by  
19 the bank, was at one time managed by Goodman, Segar, Hogan  
20 and at the same time being leased by Pembroke Realty?

21 A No, sir, I was not.

22 Q And do you know that Mr. Lindsay frequently, in  
23 his business, handles the leasing of quite a few properties,  
24 as many as, I believe, he said as six shopping centers, and  
25 which he does not manage?

1 A I did not know that, but if it is true --

2 Q Have you engaged in the preparation of any  
3 leasing agreement whereby major properties are leased and  
4 handled by leasing agents?

5 A No.

6 Q Have you engaged in the preparation of any  
7 management agreements whereby major properties are managed  
8 by real estate brokerage firms?

9 A No, I have not.

10 Q Are you aware of the fact that it is the custom  
11 to deal with leasing and management where one act combines  
12 both functions as separate activities in the same agreement?

13 MR. HOWELL: Your Honor, I would object to that  
14 question. I don't think that's in evidence at all.

15 THE COURT: I am sorry. I will have to ask the  
16 reporter to read that back.

17 (The reporter was requested to read back the  
18 previous question, and complied.)

19 THE COURT: Objection overruled.

20 BY MR. NUSBAUM:

21 Q I'll clarify that for you. It didn't come out the  
22 way I wanted it. The question is to examine your awareness  
23 of the agreement where one firm, one agent, performs both  
24 activities of leasing and management. The question is are you  
25 aware of the fact that in the agreements that such agents

1 customarily have, for the purpose of defining their  
2 responsibilities, that leasing and property management are  
3 separately dealt with?

4 A I have no knowledge that that is being done.  
5 I am not familiar with the contractual relationship between  
6 the property management firm and the owner.

7 MR. NUSBAUM: All right, sir. No other questions.

8 MR. HOWELL: One question on redirect, Your  
9 Honor.

10 REDIRECT EXAMINATION

11  
12 BY MR. HOWELL:

13 Q Dr. Crunkleton, Mr. Nusbaum has pursued with you  
14 not only the departmental arrangement of S. L. Nusbaum and  
15 Company, but other organizations. Is there anything inconsistent  
16 with the departmental arrangement, with the limits as you  
17 included them in property management?

18 MR. NUSBAUM: I would like to object to that  
19 question on the basis of the witness' familiarity with those  
20 matters from his own knowledge. I think he has demonstrated he  
21 is not in a position to give an answer to that question.

22 THE COURT: I think we have to leave that to  
23 Dr. Crunkleton. Objection overruled.

24 BY MR. HOWELL:

25 Q Is there anything inconsistent with that?



1           A       No. I think that is good business practice.  
2 I think what has been forgotten is the role of the firm, the  
3 property management firm. How you divide the duties can vary.  
4 If you have people doing the negotiations, the leasing, with  
5 a financial background, I would certainly have them as leasing  
6 agents. If I have people that are better off with a hammer  
7 and nail and poor personality, I certainly wouldn't make them  
8 a property manager. But within the firm you might have  
9 separate departments, but collectively I think those departments  
10 are performing the function of property management no matter  
11 if you delegate the authority within the firm.

12           MR. NUSBAUM: Your Honor, I move to strike that  
13 portion of the witness' response that deals with what he thinks  
14 about it in property management.

15           THE COURT: Motion overruled.

16           Anything else?

17           MR. HOWELL: No, sir.

18           MR. NUSBAUM: No, Your Honor.

19           THE COURT: Dr. Crunkleton, you may be excused.

20           (Witness excused)

21           THE COURT: Who do you have next?

22           MR. HOWELL: Alan Nusbaum, Your Honor.

23  
24  
25           \* \* \*

1 organization took any action based on this letter?

2 A Not to my knowledge.

3 Q Mr. Nusbaum, let me ask you if you can identify  
4 that document, please?

5 A Sure. This is a chart that I put together  
6 showing the structure of our company.

7 Q When was that done?

8 A I'd say it was about two to three years ago,  
9 just about. It must have been at least that long because  
10 Dianne Rowe hasn't been with us for over a year.

11 MR. HOWELL: Your Honor, we would like to have  
12 this admitted.

13 THE COURT: Without objection?

14 MR. NUSBAUM: No objection.

15 THE COURT: Defendant's Exhibit Number 1.

16 (A chart of S. L. Nusbaum and  
17 Company was marked as Defendant's  
18 Exhibit Number 1, and received  
19 in evidence.)

20 BY MR. HOWELL:

21 Q Mr. Nusbaum, I believe yesterday Mr. V. H.  
22 Nusbaum indicated that the departmental organization and  
23 operational aspects of S. L. Nusbaum and Company were the same  
24 in 1977 and in 1979 and today. You wouldn't dispute that  
25 assessment, would you, with the exception that personnel come

1 and go?

2 A Basically, I'd say that's correct.

3 MR. HOWELL: That's all I have, Your Honor.

4 ~~CROSS-EXAMINATION (Adv.)~~

5  
6 BY MR. NUSBAUM:

7 Q Alan, Mr. Howell asked you if the company took  
8 any action in response to the letter of July 11. I want to  
9 show you a paper that's marked Exhibit 15. It's dated July 27,  
10 1977. See if you were aware of that letter?

11 A No, I was not.

12 Q That would have been handled by Mr. Airing as  
13 a routine matter for his attention?

14 A Yes. Mr. Airing generally handles a lot of the  
15 insurance correspondence directly for Bert.

16 Q Does that appear to be a letter in response that  
17 you wrote to Tidewater that your firm wrote to Tidewater  
18 Insurance Agency, on the subject?

19 A That's correct.

20 Q Do you want to read that letter, please?

21 A To Mr. Larry Perse from Tidewater Insurance  
22 Agency.

23 "Dear Mr. Perse: As per our application of  
24 your new Errors and Omissions insurance policy  
25 for S. L. Nusbaum and Company, we accept the



1 policy with the understanding that property  
2 management is excluded under Claims-made policy.  
3 We are awaiting delivery of the policy as soon  
4 as possible.

5 "Very truly yours, Richard A. Airing, Vice  
6 President."

7 Q You are familiar with this chart. You prepared  
8 this chart, I believe, you said, Exhibit D-1?

9 A That's correct.

10 Q Which one of those departments was Mr. Eddie  
11 Goldmeier in when he was employed by the company?

12 A Leasing.

13 Q And was he in the management department?

14 A Excuse me. He was in the leasing, and later in  
15 sales, if that's relative. But at the time he was in the  
16 leasing department.

17 Q Did he have any -- was he executing any management,  
18 property management functions, or carrying out any management  
19 duties, property management duties, in dealing with Mr. Brady  
20 to lease him the sub shop?

21 A None whatsoever.

22 Q And in connection with your property management  
23 activities of the company, you do have the policy of requiring  
24 the owners to carry you as an insured on their insurance  
25 contracts, do you not?

1 A Yes, we do.

2 Q And that means if anyone falls down in a  
3 shopping center, or office building, and sues you, you, as  
4 a managing agent along with the property owner, the property  
5 owners' company covers you, does it not?

6 MR. HOWELL: I would object to that unless he  
7 is going to bring in --

8 MR. NUSBAUM: It's a general proposition to  
9 ask as to what is covered and not covered. I think Mr. Nusbaum  
10 can answer that.

11 THE COURT: If that was the question, the  
12 objection is well-taken.

13 MR. NUSBAUM: I believe the question is whether  
14 or not in cases where there are accidents occurring on the  
15 premises, where we furnish property management, the owners'  
16 insurance company routinely covers S. L. Nusbaum and Company  
17 as well as the owner. I think this witness knows the answer.  
18 He is administering the affairs of the company.

19 THE COURT: I misunderstood the question. I  
20 think that the question is all right.

21 BY MR. NUSBAUM:

22 Q Is that right?

23 A That's correct.

24 Q Is not that the subject that these paragraphs,  
25 one, for example, is dealing with in Bert Nusbaum's letter, to

1 remind you that you must have the owners carry you as a  
2 named insured on their contracts?

3 A That's the way I take it.

4 MR. NUSBAUM: Thank you. Answer any questions  
5 Mr. Howell may have.

6 REDIRECT EXAMINATION (Adv.)

7  
8 BY MR. HOWELL:

9 Q With the exception of responding to Mr. Purse  
10 and indicating that property management was not included in  
11 the policy, was any other action by S. L. Nusbaum personnel  
12 taken with regard to this letter, to your knowledge?

13 A Not to my knowledge.

14 Q Thereafter, in negotiating your contracts,  
15 did you follow his advice where he said in the second paragraph,  
16 "In other words, you want to create an agency situation  
17 whereby you become an arm of the owner and are covered"?

18 A Where possible.

19 MR. HOWELL: That's all I have, Your Honor.

20 THE COURT: Anything else?

21 Thank you, Mr. Nusbaum. You may be excused.

22 (Witness excused.)

23 THE COURT: Who do you have next?

24 MR. HOWELL: Richard Airing.

25 We're calling Mr. Airing, Your Honor, as an

\* \* \*

ATES



1 Q Let me ask you to refer back to the first page,  
2 Mr. Airing, and would you read the paragraph and question on  
3 that?

4 A "Do you engage in the following activities?"

5 Q Yes.

6 A "Real estate sales or listings," wrote the  
7 figures.

8 Q Yes. I believe that the application requests  
9 that on there, and also if you engage in those activities,  
10 you are to indicate your gross income from those activities?

11 A Yes.

12 Q Would you read the activity and figures you put  
13 in the application?

14 A I wrote the real estate sales listing, \$95,757;  
15 property management, \$384,040. That's the only ones we used  
16 on that application.

17 Q So at that time you were aware, were you not,  
18 based upon the application which you made, that the figures  
19 you put there, your activities, were covered to the extent of  
20 those represented by the \$95,000 figure, but not covered as to  
21 the extent of the activity represented by the \$884,000 figure,  
22 were you not?

23 A I certainly was, yes.

24 Q Let me ask you this, Mr. Airing, if in point of  
25 fact -- let me ask you aren't those figures that you recited there

1 the total gross income figures for S. L. Nusbaum and  
2 Company for the 1976 calendar year, or fiscal year?

3 A I would assume so. I am trying to figure out  
4 what date this is for. Yes.

5 Q They would have been. Mr. Airing, let me ask you  
6 if you can identify that document? It's produced by  
7 Goodman and Company?

8 A Yes, I have seen it.

9 Q What is that?

10 A It's a gross profit analysis that they prepared.

11 Q And that indicates your gross income for each  
12 of the years recited there including 1976, does it not?

13 A Yes.

14 MR. HOWELL: I would like to have this admitted.

15 MR. NUSBAUM: I would like to object to that.

16 I believe we have a right to object to that exhibit under  
17 preparation.

18 THE COURT: You have a right to object?

19 MR. NUSBAUM: That it was not identified to us  
20 as an exhibit in this matter.

21 THE COURT: Was there a pretrial request?

22 MR. NUSBAUM: We'll withdraw our objection.

23 THE COURT: Defendant's Exhibit Number 2.

24  
25 \* \* \*

1 THE COURT: I'll have to change the designation  
2 on it because of the subsequent argument.

3 BY MR. HOWELL:

4 Q Let me ask you, Mr. Airing, the \$95,000 figure  
5 which you put in the application, that represented your total  
6 gross income from residential sales at that time, did it not?

7 A It indicated sales, not necessarily residential  
8 sales.

9 Q Total?

10 A Total.

11 Q Total gross income from sales?

12 A Yes.

13 Q As I understood your testimony, the \$884,000  
14 figure represented total gross income for property management?

15 A Yes, property management.

16 Q All right. There was no other gross income  
17 from other sources that year, was it?

18 A Not related to what was on this application, no.

19 Q Was there any other gross income, period?

20 A Yes. We would have probably interest income,  
21 or dividend income, from other investments which is not on the  
22 application.

23 MR. HOWELL: Your Honor, I think the document  
24 does become relevant now because he indicated it was not the  
25 total gross income as he understood it is. That document does



1 reveal that that was the total gross income insofar as  
2 management and other activities were concerned.

3 THE COURT: Mr. Nusbaum, does this change your  
4 position?

5 MR. NUSBAUM: No, sir. I think he said that  
6 there was dividend income and interest income and that's  
7 not operating income and wouldn't have anything to do with  
8 the previous response or with the application form.

9 BY MR. HOWELL:

10 Q Let me understand you, then, Mr. Airing, is  
11 it correct that the figures which are on there, other than  
12 passive income such as dividends or interest, are the total  
13 income generated by the operation of the real estate agency  
14 in 1976?

15 A Yes.

16 Q Now, it has previously been indicated, since  
17 its inception in 1970, all of that Hilltop North Shopping Center  
18 had been generating rental income and S. L. Nusbaum had been  
19 collecting commissions on that rental income. Now, my  
20 question to you is that being the case in 1976, the income  
21 which was collected by S. L. Nusbaum and Company for commissions  
22 at Hilltop North Shopping Center, or the activities out there,  
23 would have been that property management figure, would they not?

24 A That's true.

25 Q So at the time you filled out this application,

1 you knew that those activities were not covered under the  
2 policy, did you not?

3 A Yes.

4 MR. NUSBAUM: I object to that question, Your  
5 Honor. In fact, the proposition that he hasn't said what  
6 activity he is talking about.

7 MR. HOWELL: I said all.

8 THE COURT: You said property management.

9 BY MR. HOWELL:

10 Q How about all activities?

11 A No.

12 Q What would be excluded?

13 MR. NUSBAUM: That's a question of law. I  
14 object to that question.

15 MR. HOWELL: Your Honor, I am asking him what  
16 portion of any income which was derived from Hilltop North  
17 Shopping Center would have been deleted from that \$884,000  
18 figure?

19 THE COURT: I don't think that's what you asked.  
20 I am not sure what you asked. I think you asked what would  
21 be excluded from coverage under the terms of the policy which  
22 excludes management, and I think that objection is well taken  
23 to that question.

24 MR. HOWELL: All right, Your Honor.  
25

1 BY MR. HOWELL:

2 Q My question now is was any income derived  
3 from any activities at Hilltop North Shopping Center in  
4 1976 deleted from that \$884,000 figure?

5 MR. NUSBAUM: I object to that question. He  
6 had already answered that question.

7 THE COURT: Objection overruled.

8 THE WITNESS: As far as property management in  
9 our leasing method, yes, they would include all the management  
10 fees earned from Hilltop North.

11 BY MR. HOWELL:

12 Q So everything you derived from Hilltop North  
13 Shopping Center in an income status that year would be in that  
14 figure?

15 A No. You said property management and leasing  
16 fees.

17 Q Property management and leasing fees?

18 A Yes.

19 Q What would not be included?

20 A Income derived from our investments in Hilltop  
21 North.

22 Q A passive investment?

23 A Right.

24 Q Let me show you, Mr. Airing, Exhibit 15, and ask  
25 you if you wrote that letter -- recognize it?



1 A Yes. I remember seeing it.

2 Q Would you read that letter out loud?

3 MR. NUSBAUM: He has already read it once.

4 MR. HOWELL: Your Honor, I can't question him  
5 about the letter -- it only has one short paragraph.

6 THE COURT: The letter is in evidence. It's  
7 already been read to us.

8 THE WITNESS: Do I need to read it out loud?

9 BY MR. HOWELL:

10 Q Yes.

11 A "Dear Mr. Perse: As per your application of our  
12 new Errors and Omissions insurance policy for S. L. Nusbaum  
13 and Company, we accept the policy with the understanding that  
14 property management is excluded under Claim-made policy. We  
15 are awaiting delivery of this policy as soon as possible."

16 Q What prompted you to write that letter?

17 A What prompted us to write the letter? It was  
18 done because we were told that property management was not  
19 part of our errors and omissions policy, and so, therefore, in  
20 order to make clarifications that's why I wrote the letter.

21 Q It has previously been indicated by Mr. V. H.  
22 Nusbaum and Mr. Alan Nusbaum that the departmental structure  
23 and operating structure of S. L. Nusbaum and Company has been  
24 the same since 1977 when this policy was written. You wouldn't  
25 dispute that, would you?

1 A I would not dispute that, no.

2 Q Is it not, in fact, true, Mr. Airing, in that  
3 regard you treat your leasing department as a non-revenue  
4 producing department?

5 A Yes, because of the way our management and  
6 leasing agreements are written. There is no distinction  
7 between what percentage is leasing and what percentage is for  
8 management.

9 Q In point of fact, the expenses of that department  
10 are allocated among the property management department and the  
11 development department, are they not?

12 A Yes. They are also allocated to administration.

13 Q Yes. So in that regard, those expenses are  
14 basically treated as an overhead of the other departments,  
15 property management and development?

16 A Yes.

17 CROSS-EXAMINATION (Adv.)

18  
19 BY MR. NUSBAUM:

20 Q Mr. Airing, you mentioned investment from Hilltop  
21 North. The company owns two percent of Hilltop North; is  
22 that correct?

23 A It did in 1977.

24 Q Speaking now about your recording the revenues  
25 of the leasing department and the revenues of the property

1 management department as a single item. You're referring  
2 to the fact that you have arrangements where most owners give  
3 you one amount of commission and don't bother to say how much,  
4 what portion of that commission is for leasing and what portion  
5 is for management if you are performing those functions; is  
6 that correct?

7 A That's correct.

8 Q Did you receive a leasing fee from the medical  
9 building that the company did not manage at the time it leased  
10 it?

11 A Yes, we did.

12 Q So that income would be recorded in the same  
13 manner, wouldn't it?

14 A That's correct.

15 Q Even though there's no management whatsoever  
16 involved?

17 A That's correct.

18 MR. NUSBAUM: That's all the questions I have.

19 MR. HOWELL: One question on redirect.

20  
21 REDIRECT EXAMINATION (Adv.)

22 BY MR. HOWELL:

23 Q Mr. Airing, in the testimony yesterday, Mr. V. H.  
24 Nusbaum indicated --

25 THE COURT: Even though we excluded the witnesses,



1 counsel, I don't think it's proper to recite to the witness  
2 what previous witnesses have testified. Ask him any question  
3 you want.

4 BY MR. HOWELL:

5 Q Taking the last five years, which is since you've  
6 been with the company, wouldn't you agree that it's extremely  
7 rare where you have a client who comes to you and takes leasing  
8 functions as opposed to taking a leasing and management function?

9 A Just strictly leasing?

10 Q Yes.

11 A Yes. It's rare in our total complexity, but  
12 it's not unusual for us to have an arrangement.

13 Q How do you define unusual?

14 A Unusual, meaning that we prefer to have both  
15 management and leasing because of the way we're structured,  
16 due to our overhead. But we have, in several instances, taken  
17 on just leasing efforts. The medical building is one of those.

18 Q You say several?

19 A Yes.

20 MR. HOWELL: Thank you.

21 THE COURT: Any further questions?

22 Mr. Airing, you may be excused.

23 (Witness excused)

24 MR. HOWELL: The defense rests at this time,

25 Your Honor.

\* \* \*

1 THE COURT: After lunch?

2 MR. NUSBAUM: Yes, sir. We don't want to take  
3 them up on an empty stomach.

4 THE COURT: Do you want to state your motions?

5 MR. HOWELL: I would make the usual motions to  
6 strike in light of the evidence which is only for the same  
7 reasons. I don't want to belabor the Court.

8 THE COURT: You renew your motion to strike?

9 MR. HOWELL: To strike the evidence and enter  
10 summary judgment on behalf of the defendant.

11 MR. NUSBAUM: Our motion is that the Court  
12 decide the question of coverage as a matter of law, and take  
13 that matter away from the jury. We don't think there's any  
14 facts to go on to the jury on that question. The evidence is  
15 so clearly in favor of the plaintiff that there would be no  
16 jury question.

17 THE COURT: You move to strike the defendant's  
18 evidence and to determine the issue of coverage as a matter of  
19 law; is that correct?

20 MR. NUSBAUM: Yes, sir.

21 THE COURT: There is no dispute as to the matter  
22 of damages so if the Court were to sustain that motion, it  
23 really would go ahead and enter judgment for the undisputed  
24 amount of damages? There's no question of the damages to  
25 submit to the jury if that question is decided by the Court?

1 MR. HOWELL: Well, Your Honor, there is, and  
2 I apologize for not making that clear. We move to strike on  
3 the issue of damages because there's been no showing of  
4 reasonableness on the damages figure.

5 THE COURT: All right. Gentlemen, I understand  
6 what your motions are. I don't want to analyze them any deeper  
7 at this time. We'll take them up after lunch. I wish we  
8 could have an hour for lunch and then not have brought the  
9 jury back merely to have them sit in the jury room while we  
10 are arguing these motions.

11 MR. NUSBAUM: Judge, you will probably find them  
12 all across the street having lunch.

13 THE COURT: At any rate, do we need a full hour  
14 for lunch? We don't want to be in the middle of argument  
15 when the jury walks in. We will make it 1:30.

16 MR. HOWELL: Thank you, Your Honor.

17 (A luncheon recess was taken at 12:30 p.m.)

18  
19 AFTERNOON SESSION

(1:55 p.m.)

20  
21 THE COURT: Mr. Howell, I suppose your motion  
22 would come first.

23 MR. HOWELL: Yes, Your Honor. There are several  
24 motions, and I don't want to belabor the Court's time, but  
25 I would renew my initial motion to strike which I made when the



1 plaintiff rested, to strike the evidence on both counts.  
2 First, as to the count of the issue of coverage because I  
3 think since the Court ruled on that motion there has been  
4 testimony in which there was an ambiguity in the policy,  
5 first of all, to indicate in the industry there is a  
6 generally understood definition of property management which  
7 includes leasing which is not negated by the fact that this  
8 company divided his property management functions among leasing  
9 and other administrative departments.

10 I think one thing which is extremely critical  
11 in this case is the evidence, an admission by Mr. Airing, when  
12 he applied for this policy that based on the application which  
13 asked him if he knew that property management and those things  
14 were excluded in the policy, he said yes. He said yes today,  
15 that in filling out that form he also put down the only two  
16 activities that they engaged in as sales and property management,  
17 that the sales figure in that regard was approximately ninety-five,  
18 ninety-six thousand dollars, around that area, and the property  
19 was \$884,000. He was then required, within two weeks, to  
20 write a letter on the letterhead of S. L. Nusbaum acknowledging  
21 that that significant portion of that business under property  
22 management was not covered. I think the computations were  
23 made that the coverage they had was approximately ten percent.  
24 This was brought home unequivocally. It was also what prompted  
25 Bert Nusbaum's letter to Alan saying there were significant gaps

1 in the policy based on what you do, and paying particular  
2 attention to exclusions A through G, and here are the things  
3 to restructure that coverage and make sure that you are  
4 covered.

5 In addition, the application clearly indicates  
6 that Mr. Airing knew at the time that those activities which  
7 were transpiring at Hilltop North Shopping Center were being  
8 placed by him within the definition of property management  
9 and understood it to be so, that all of these activities  
10 and income generated, therefore, were clearly placed under  
11 what he knew and reaffirmed was excluded.

12 We would move to strike count one on those  
13 bases.

14 We move to strike count two on the facts which  
15 have been argued before, Your Honor, before; that being  
16 there is no duty on the insurance company to settle a claim.  
17 At no time was there any evidence that a definite settlement  
18 offer was ever communicated in any way to the insurance company  
19 in this case because at no time in the mind of the attorney  
20 for Mr. Brady was there ever a figure which he communicated  
21 saying this was it. That's the way he left it on July 19th,  
22 saying I am going to have Brady figure up the losses and get  
23 back. That was the end of it. They were never contacted  
24 again. The situation went on wherein information developed  
25 which indicated to Mr. Rigsbee that there was a significant



1 question of coverage. When he thought he had sufficient  
2 information that he could no longer proceed, he advised them  
3 that they were under a reservation of rights. Right shortly  
4 after that coverage was denied.

5 I don't think there's any basis to submit to  
6 the jury, to allow them to speculate, as to what Mr. Brady  
7 would have taken in a given time, and whether or not at that  
8 given time the insurance company should have approached him,  
9 or their own attorney, when none of those facts were even  
10 communicated to St. Paul.

11 Lastly, we would move to strike the plaintiff's  
12 evidence on the basis that the damage figures which have been  
13 presented -- there has been no evidence that they were, in  
14 fact, reasonable. The judgment has been placed in the record.  
15 The bills received from S. L. Nusbaum and Company from their  
16 attorneys have been placed in the record. There's nothing  
17 outside of that that would indicate that they are reasonable  
18 and major. We would move to strike on that basis also.

19 Thank you.

20 THE COURT: Gentlemen, before we go further,  
21 let me ask you -- I don't want to hold this jury unnecessarily.  
22 Under any ruling of the Court on these motions, do you perceive  
23 there be any questions of fact for the jury, Mr. Howell,  
24 whether I rule for or against you on your motion, or for or  
25 against Mr. Nusbaum on his? Do you see any resulting question



1 of fact for the jury?

2 MR. HOWELL: Your Honor, I think this Court's  
3 initial reaction has been and is correct in that I really  
4 don't think there has been a jury issue presented. Particularly  
5 with regard, I don't believe, to the first count. I understand  
6 the Court's position that that is a matter of contractual  
7 conduct, and I think that normally is the function of the judge.

8 I don't think, based on the evidence, that there  
9 is a real jury issue with regard to the second count.

10 THE COURT: Mr. Nusbaum.

11 MR. NUSBAUM: If Your Honor please, I think the  
12 first issue is not a jury issue. But I think the second issue,  
13 in good faith, is a jury issue, and we've reached the point  
14 where there appears, to me, that there are facts which the  
15 jury could find.

16 THE COURT: I hate to make a mistake of releasing  
17 them early, just to relieve them of sitting there, and then  
18 we would have to start all over again. I will hold them if  
19 you think there is any issue to be submitted to the jury.

20 If I rule against you on count one, then you  
21 would argue that count two should go to the jury?

22 MR. NUSBAUM: I think so.

23 THE COURT: In that case, we'll hold them.

24 Please give your response to Mr. Howell's motions,  
25 and I'll hear your motions now.

1 MR. NUSBAUM: All right, sir.

2 If Your Honor please, Mr. Howell has told the  
3 Court within the last two or three minutes again that he  
4 concedes that there was an ambiguity in the policy. Now, that  
5 being so, we have a principle of law that's been imbedded in  
6 Virginia law for really so long back, that I am embarrassed  
7 to cite it because it's so well-established.

8 But in 147 Va. 471. Page 476; Newsoms against  
9 Commercial Casualty Insurance Company, going back to 1926:  
10 "It is the universal rule of the courts to construe language  
11 used in an insurance policy, to limit the liability of the  
12 company, strongly against the company." And again, "Policies  
13 are drawn by legal advisers of the company, who study with care  
14 the decisions of the court and with those in mind attempt to  
15 limit, as narrowly as possible, the scope of the insurance. It  
16 is only a fair rule which courts have adopted to resolve any  
17 doubt or ambiguity in favor of the insured and against the insurer."  
18 It goes on to cite a case going back to 84 Va. So that we have  
19 a case here where the evidence plainly shows that property  
20 management and leasing, as insurable activities -- leave out book-  
21 keeping and the fact that some properties require both and some  
22 properties use the same person to perform both, some don't.  
23 They are differentiated from an operational point of view. The  
24 conjure of liability this insured seeks indemnity for arises  
25 from its operations in the field, its leasing, its sales. In a



1 sense, leasing is far more akin to sales than it is to  
2 management because it's the making of the bargain continued.  
3 By the same token, referring to the application which Mr. Howell  
4 relies on so heavily, that's really all he's got. That was  
5 filled in against -- you might say -- Nusbaum's interest by  
6 their finance officer, Mr. Airing. On his books it would  
7 appear that he does not keep a separate column for the leasing  
8 and the property management activities because in the majority  
9 of instances, as he candidly testified, the company is performing  
10 both of them and to most owners it doesn't make any difference  
11 how much of the total fee is allocated to one as to the  
12 other.

13           Of course, it didn't make that much difference  
14 to the needs of S. L. Nusbaum and Company from a bookkeeping  
15 standpoint. But that has nothing to do with the operational  
16 aspects where the insurance need comes into being and for  
17 which we're seeking insurance, and the fact that every leasing  
18 firm in the area conducts its leasing operations separately  
19 and with separate personnel and separate departments, as a  
20 separate recognized activity, the fact that S. L. Nusbaum  
21 Company's own departmental operation plan that relates to the  
22 period in question had a leasing department. Mr. Goodmeier  
23 was in that department. He was not in property management  
24 in any way. I submit that this is not a risk against which  
25 the insurer was seeking to exclude it. If not, they did not



1 successfully do it by using the English language in a  
2 reasonably successful form, and of the ambiguity which can  
3 be construed for the plaintiff in this case, so it would not  
4 occur to me to be an ambiguity. I think the experience of the  
5 people engaged in this industry--and I certainly rank Mr.  
6 Lindsay among the chief of them in this region. I think  
7 his integrity and reliability are well-known in the community  
8 and to this Court. He is a competitor of S. L. Nusbaum and  
9 Company, and I think someone could offer him any amount of  
10 money or an inducement of any kind, and have him tell anything  
11 but the truth. He has come before this Court. He is  
12 engaged in the business. He has been in it all of his mature  
13 life, a great number of years, and he knows for a fact that  
14 Goodman, Segar, Hogan, which is the other predominant firm in  
15 the area as well as Pembroke, all recognize and depend on an  
16 operation of this distinction.

17 Now, as the Court remarked, the insurance company  
18 must have intended to cover something. They start out flatly  
19 covering the activities in real estate agencies, and then  
20 they have a right to make exclusions. Those exclusions are  
21 worded very much to their advantage and to their purpose as  
22 they know how to word them. But, as Your Honor pointed out,  
23 the exclusions here have nothing to do with the way you record  
24 receipts. They have nothing to do with your bookkeeping  
25 and accounting procedures in your office. They talk about

1 arising out of and in the course of operation of property  
2 management.

3 Now, unless the Court has been shown to its  
4 satisfaction that property management does include leasing,  
5 and the evidence on that is heavily in favor of the fact that  
6 it does not in this community, and in this instance, then,  
7 it doesn't seem to me even if there would be an ambiguity,  
8 the insurance company would avail itself of this ambiguity in  
9 any way to take this out of the ruling.

10 Now, one of the things that Mr. Howell is urging  
11 for his company is inadequacy of its own application form.  
12 Its application form doesn't have a space to record leasing  
13 revenues. If it did, then some effort would have to be made  
14 to allocate some funds to leasing revenues. But it has  
15 various categories: appraisals, one thing and another, and  
16 apparently it doesn't regard leasing as an area where there  
17 is very much risk. If it did -- it's a big, grown-up company,  
18 been in business a long time with expert people. This policy  
19 is particularly, expressly for real estate agencies. It's  
20 got real estate acts printed on it everywhere, and it is  
21 designed for real estate agencies, and surely this Court is  
22 going to charge St. Paul Insurance Company with the knowledge  
23 that real estate agents engage in leasing, and that's a  
24 significant and regular part of its activities.

25 If it intended to embrace leasing under property



1 management, it should have said including leasing, or it  
2 should have defined property management in its policy. It  
3 defines a great number of terms. The truth of the matter is,  
4 that the risk in an errors and omissions policy associated  
5 with leasing must not have been regarded as a very significant  
6 risk, and it simply made an oversight, and policy language  
7 is changed directly as a result of court cases where they  
8 realize that. For that matter, as they learn, the lawyers  
9 change the policies to cover things they didn't cover earlier.  
10 But certainly in Mr. Airing's writings to Tidewater Insurance  
11 Agency that he was aware of the fact that the policy didn't  
12 cover property management this does not in any way betoken a  
13 representation on his part, on the company's part, that this  
14 policy doesn't cover its leasing department and the activities  
15 of that department.

16 If it did betoken that, one would have to  
17 wonder what he thought he was buying because it's apparent  
18 from the figures that have been submitted here that the  
19 sales activities were relatively incidental in this firm, and  
20 the appraisal activities is insignificant. I don't think  
21 anyone would have bothered to pay a premium to cover the few  
22 dollars of appraisal fees. It must be assumed that the  
23 company did, in good faith, think it was acquiring some  
24 coverage for this policy, and the fact that this policy  
25 application form did not provide any way for identifying leasing,



1 commissions, or allocating leasing commissions. It never  
2 asked for that figure. There's no place on that policy where  
3 it says leasing, commissions, or other commissions or other  
4 revenues or other activities. I submit to the Court that  
5 that is not a problem which S. L. Nusbaum and Company should  
6 be required to solve. It did not design the application. It  
7 cannot be charged with the burden of having to read St. Paul's  
8 mind and be asked to explain all these things to St. Paul  
9 when it knows what its property management operation is and  
10 it knows what its leasing activity is, and it is no different  
11 from any other competing firm in the area.

12 I am satisfied that this Court would appreciate  
13 but give little weight to the testimony of the good doctor  
14 because he is totally inexperienced in this field. He has  
15 not been active in property management or done research or  
16 other work in any way that could lend any meaning to his  
17 testimony. So you're left with the testimony of V. H. Nusbaum  
18 and Mr. Lindsay and the facts of the case, and the clear-cut  
19 division within the company as testified by all its officers.  
20 I don't think it's any dispute about that. So on the first  
21 issue, I submit that there is no limit by which the company  
22 could avail itself of those exclusions, and I'd also say at  
23 this point that I think the law of construing insurance  
24 company policies not only is in favor of resolving ambiguities  
25 in favor of the insured, but I think exclusions, particularly

TAYLOE ASSOCIATES

REGISTERED PROFESSIONAL REPORTERS  
NORFOLK, VIRGINIA

1 since they do narrow the coverage, are always liable for  
2 special consideration by courts in construing exclusions.  
3 I think there's a line of authority in insurance cases that  
4 the company ought to exclude itself from liability and  
5 must do so with sufficient particularity and accuracy of  
6 language that cannot be considered to have led the insured  
7 to think that he might have coverage, and any question as  
8 to the way the exclusion is worded would have to have been  
9 construed in favor of the insured.

10 Another thing that Mr. Howell alluded to was  
11 things to be done in connection with the property management  
12 aspect of the letter from Bert Nusbaum to the company. Those  
13 are routine things that have been testified to, that were  
14 already the policy of the company, have been, and on every  
15 occasion is solicited from the owner and is routinely and  
16 in nearly all cases obtained, and that is that the liability  
17 policy of the property owner is endorsed to make the agency  
18 a named insured along with the property owner so that the  
19 property owner's insurance, liability insurance, the insured's  
20 owner, landlord, and tenant coverage, is automatically the  
21 primary coverage. That's because of the necessity of the  
22 trade. Every brokerage firm has its own liability coverage,  
23 but it's always secondary. They couldn't afford the premium  
24 if it were primary, and they are covered the same way as if  
25 the owner had his own personnel in there. That's the



1 philosophy of that. I am sure the Court knows that, and  
2 if Your Honor would manage it himself, he would have his  
3 own personnel and they would be covered by the policy, and  
4 if the corporation itself manages it, they routinely give  
5 that protection. All that's happening in that letter is  
6 that attention is being invited to the fact that personal  
7 injury is not covered under the E & O form, and it's imperative  
8 that you don't think you are getting that type of coverage,  
9 and you continue to have your owners include you among the  
10 named insured in their policies.

11 As to the second count, I would say also, Your  
12 Honor, that nothing that Mr. Howell has shown the Court could  
13 possibly be deemed to convert the separate activity of leasing  
14 into management. Leasing and management as co-terms and  
15 synonymous terms, I should say. It's well and good to convince  
16 the Court of that, but short of that, the papers are his own,  
17 and, accordingly, all of which were contrived for the use and  
18 benefit of the St. Paul Company. He's failed to convert  
19 leasing into management, failed to identify it as part of  
20 management, or to warn the insured that it's going to be  
21 regarded as part of management. Certainly, if that was the  
22 intended, some type of warning would be appropriate.

23 I'll go on to the second count.

24 THE COURT: I want to ask you to defer, and I  
25 think Mr. Howell would like to respond to your motion on the



1 first count.

2 MR. HOWELL: First of all, I did not intend  
3 to say that there was an ambiguity of the policy. I was  
4 merely addressing the Court's concern about that question  
5 expressed when the previous motion to strike was made.

6 With regard to the things which Mr. Nusbaum  
7 has delineated, I come back again to his harping continuously  
8 on the fact that S. L. Nusbaum departmentalizes. It has  
9 a leasing department, just like law firms that have different  
10 departments, but they are still practicing law. Just  
11 because people do separate functions in a law firm, that  
12 doesn't mean they are not practicing law. If you are a  
13 property management firm, just because you let one person do  
14 leasing, one person do maintenance, one person do insurance,  
15 and one person do accounting, that doesn't mean that you are  
16 not engaged in property management. In that regard, this  
17 was along the same lines that Mr. Lindsay put it, we've got it  
18 as a separate function. I think you had to concede that  
19 this authority in the field, which he finally recognized,  
20 was directed to the contrary, and I would point out to the  
21 Court that the Institute of Real Estate Management, about  
22 which he was talking, is listed as an organization of which  
23 S. L. Nusbaum is a member on the very application which  
24 Mr. Airing filled out, which he testified to. He conceded  
25 that while leasing is a separate department, it has no income.

1 It is treated as an overhead item. It is treated as nothing  
2 more than a subdepartment of the property management section  
3 and development section, both of which are excluded under  
4 this policy. It is nothing more than the administrative costs  
5 of that department, any less so than their overhead for  
6 bookkeeping, their overhead for other items, and as far as  
7 Mr. Airing filling out the application, both he and Mr. Alan  
8 Nusbaum testified that he was authorized and normally did  
9 that type of thing in responding to these things applied to  
10 the policy, and that's why he signed the application, that's  
11 why he wrote the letter saying he was acknowledging that  
12 property management isn't covered.

13 Mr. Nusbaum also said if leasing wasn't covered,  
14 what were we buying, as if they weren't buying anything. Surely  
15 they appreciate that what they were buying was very restrictive  
16 coverage. In filling out the application they acknowledge  
17 that \$884,000 out of \$95,000 isn't covered. They realized  
18 at that point there was significant gaps in the policy. The  
19 fact that this isn't a leasing category is certainly consistent  
20 with the general understood definition that leasing is not  
21 property management. If that wasn't so, why did they fill it  
22 out that way?

23 The other question which arises is the emphasis  
24 which is placed upon leasing as a separate function. I think  
25 that surely must be undercut by Mr. V. H. Nusbaum's testimony



1 that in five years they only had one instance in which  
2 anybody came and said I want you to be a leasing agent as  
3 opposed to managing our property. That's doing the same  
4 thing. It certainly indicates again, in the industry, it is  
5 the general accepted practice that all of that comes under  
6 real estate management.

7 I would urge upon this Court to, perhaps,  
8 consult those authorities in the industry with regard to that  
9 definition.

10 As far as Mr. Bert Nusbaum's letter which was  
11 written again, I believe, in July, advising S. L. Nusbaum of  
12 the restrictive nature of what they were buying, of the lack  
13 of coverage they had, he didn't write a routine letter. He  
14 said I want you to pay special attention to A. through G,  
15 and the restrictive nature of the coverage that you have, and  
16 here are three things to do. It prompted him to take the  
17 time to write a specific letter with regard to that policy  
18 which is explained in the letter and to point out the serious  
19 shortcomings as far as what they were being covered for and  
20 in view of all of that to take some steps to eliminate them.  
21 Mr. Alan Nusbaum indicated they didn't do anything, they went  
22 along as they were. If there is ambiguity, and I don't think  
23 there is, but if there is ambiguity, as the Court has indicated,  
24 we look to the general definition of the words, the way the  
25 words are understood in the industry of which S. L. Nusbaum and



1 Company operate. S. L. Nusbaum is not a small organization  
2 which has no familiarity with the real estate industry. They  
3 have a policy which uses the general definition of those terms,  
4 what the definitions are in the industry, and they should be  
5 bound by them. I certainly don't think if there is any  
6 ambiguity, they can rise any higher than their own admission  
7 in filling out the policy they understood property management  
8 to include leasing. That's where they put that income, that's  
9 where they considered those activities and that leasing is  
10 nothing more than a subdivision of the property management  
11 and development section which it receives. I don't see how  
12 Mr. Airing's testimony could have been any stronger in that  
13 regard. It was an overhead item and allocated specifically  
14 to departments which he admits were excluded.

15 Thank you.

16 THE COURT: I think that concludes it, Mr. Nusbaum.

17 MR. NUSBAUM: I have some responses to those  
18 arguments, if I may.

19 THE COURT: We're done with count one at this  
20 point?

21 MR. NUSBAUM: Yes, sir.

22 THE COURT: The defendant's motion on count one  
23 would be overruled, and an exception noted.

24 Plaintiff's motion on count one will be sustained  
25 to the extent that it was made. Now, the motion was, as I

1 understand it, that the Court rule as a matter of law that  
2 there was coverage for this particular event under the  
3 evidence in this case.

4 If there was, and there is a genuine dispute  
5 as to the amount of damages resulting, the question of damages  
6 would go to the jury, and appropriate instructions.

7 If there is no dispute as to the amount of damages  
8 resulting from that conclusion of law, then the Court would  
9 simply enter a judgment for the plaintiff in the amount  
10 approved. Now, if we didn't agree that -- I would say to you  
11 that I don't recall any dispute -- I think the figures, the  
12 amount of the judgment plus interest, plus the amount of the  
13 attorney's fees are in evidence. I am not ignoring Mr. Howell's  
14 observation that there's no evidence in support of their  
15 reasonableness, but there's no evidence to the contrary. I  
16 am not at all sure that this evidence of reasonableness would  
17 apply to a jury's verdict anyway.

18 It can be the most outrageous verdict in the  
19 world, and the plaintiff is required to pay it. Then, I  
20 think that's his loss. I don't think we could have gotten  
21 into the question here of whether that jury was right or wrong  
22 in the amount of damages they assessed. On that point, Mr.  
23 Howell, that is, whether the ruling of the Court is favorable  
24 to Mr. Nusbaum on his motion, the result then is the question  
25 of amount going to the jury, or whether the result, although



1 unfavorable to you, should be that the Court enter judgment  
2 in the undisputed amount. Do you care to comment on that?

3 MR. HOWELL: Well, Your Honor, the Court,  
4 obviously, appreciates our objection. I do not think there  
5 was any testimony or evidence that this amount was termed  
6 reasonable. It was certainly no testimony that the cost of  
7 the attorney's fees were reasonable. The attorneys have  
8 charged \$1,300. It's the burden of S. L. Nusbaum to come  
9 in and say that was a reasonable bill for services rendered.

10 THE COURT: Well, I am not persuaded by that  
11 point. Now, putting aside the question of reasonableness,  
12 under the evidence in the case, am I not correct that the  
13 two elements of damage proved, the amount of the verdict  
14 plus interest and the amount of the attorney's fees, are  
15 fixed, fixed and not in dispute, and that the judgment, if  
16 favorable on count one to the plaintiff, would be the sum of  
17 those two figures?

18 MR. HOWELL: Your Honor, there is no argument  
19 that the judgment figure was what the judgment order reflects.  
20 There's no argument that the bills, which were put in evidence  
21 as far as attorney's fees and costs, were the bills and costs  
22 that were submitted to S. L. Nusbaum. Our objection runs  
23 to the failure to produce any testimony of the reasonableness  
24 of the amount. I would like to make one further point in  
25 that regard: Any amount has to be reduced by the deductible,



1 I believe, of the policy under any circumstances.

2 THE COURT: I am sure that's true.

3 MR. HOWELL: Which is \$2,000.

4 THE COURT: If the company's policy provides  
5 for the deductible, the judgment would be the total amount  
6 of the verdict and interest on the prior judgment and interest,  
7 plus the amount of the attorney's fees less the \$2,000  
8 deductible. There's no dispute as to those figures?

9 MR. NUSBAUM: Yes.

10 THE COURT: The judgment, then, will be entered  
11 in favor of the plaintiff for the sum as computed. It  
12 seems to me, in this case, gentlemen, that first of all  
13 as to the events that occurred, there is no dispute of any  
14 material fact. The act which gave rise to the claim that's  
15 been the subject of this case was in the course of the  
16 negotiations by an employee of S. L. Nusbaum with a  
17 prospective tenant for the terms of the lease, for the entry  
18 into a lease. That's not in dispute. There was, at the time,  
19 a policy. This policy which we're dealing with was in full  
20 force and effect. That's not the dispute. A claim did arise  
21 that did result in a lawsuit to the extent that the company  
22 offered a defense and paid its own counsel. That's not in  
23 dispute. To the extent that at a certain point they did  
24 deny coverage, and the insured was required then to provide  
25 its own counsel, and there was a suit and a judgment and that

1 this judgment accumulated interest, was ultimately paid,  
2 and the attorney's fees are owing is not in dispute.

3 Now, under the terms of the policy, then if  
4 there was coverage, the company is liable for that computed  
5 amount. If there was no coverage, it was not. The question  
6 of coverage is governed by the terms of the policy, and to the  
7 extent that any construction of those terms is required, this  
8 is the question of law for the Court. To the extent that  
9 there is any disputed evidence in the case, it seems to me  
10 to go to the question of construction of the terms and not  
11 to what facts occurred or what events occurred.

12 There seems to be evidence that the term  
13 management in some instances does, and in some instances it  
14 does not, and in some instances it doesn't necessarily include  
15 what is called leasing. Apparently there are, even in the  
16 leasing operations, different acts. One would be negotiating  
17 a lease and the other would be collecting the rents,  
18 enforcing terms of leases, and that sort of thing. It appears  
19 to me that the plaintiff brought itself under the terms of  
20 the contract which was their burden when those facts, which  
21 I have stated, were proven, and the contract of insurance was  
22 introduced into evidence which provides coverage for any  
23 negligent act, error or omission in the conduct of the insured's  
24 business as real estate agent.

25 Now, there are certain principles, then, that



1 follow. I think we are all in accord, if there's no  
2 exclusions at all, the act of S. L. Nusbaum's claim in this  
3 instance would clearly have been within the terms of the  
4 contract, and coverage would have been afforded by the contract.  
5 The defendant relies on certain exclusions, and relieving it  
6 of that responsibility for coverage, which would have applied  
7 had the exclusions not been there. Under the circumstances the  
8 burden, I believe, is on the plaintiff to bring itself within  
9 the terms -- the defendant within the terms of the exclusion.

10           The Court's decision does not turn on who has  
11 the burden. In this instance, it is also clear that the  
12 exclusion must be specific, and it must clearly cover the  
13 act which provides the basis, or the circumstances, for the  
14 claim, and it must be construed to the extent that instruction  
15 isn't necessary at all. It must be construed most strictly  
16 against the insurance company. Those are rather basic  
17 principles, I think, that govern us in this case. In each of  
18 the exclusions to which you refer I think it boils down to  
19 the question of exclusion of acts arising out of the management  
20 of property necessarily excludes the negotiation of the lease.  
21 The contract doesn't say so. It appears from the evidence that  
22 there may be some differences. The company, and I believe the  
23 expected here is that -- although among the companies in this  
24 area it does not necessarily and perhaps does not, period -- The  
25 defendant's witness, Dr. Crunkleton, did say that his view of



1 the circumstances was that a real estate company which is  
2 engaged in handling rental property is therefore engaged  
3 and involved in management of that property. If, within its  
4 own structure, it chooses to divide the functions of leasing  
5 and functions of property management, other functions of  
6 property management, that that's internal consideration and  
7 does not change the fact that no matter which of those  
8 activities a person is involved in, in his view, as he sees  
9 it, the thing involved is property management. Mr. Rigsbee's  
10 testimony was right to the contrary, and it seems to be the  
11 best that can be said from the point of view of the defendant  
12 is that there is some evidence both ways. But it seems to me  
13 to be clear that the defendant has not proven that. If we  
14 look to the proof beyond the actual language of the contract,  
15 that an act of negotiating a lease which is clearly an act  
16 in the conduct of the business as a real estate agent, is  
17 that that act is also an act necessarily of management in  
18 the broad sense that, it is included in the exclusions.

19           It seems to me, therefore, that we are left with  
20 the question involved before the Court in which it is necessary  
21 under this evidence and the rules of contract for the finding  
22 of the Court to rule favorably for the plaintiff on this point.  
23 We have no material dispute in the facts, and therefore,  
24 nothing for the jury to determine. It would be the ruling and  
25 the judgment of the Court that the plaintiff will recover in

1 the computed amount. I don't want to attempt to recite the  
2 dollars, and I don't think there will be any problem on that;  
3 that the defendant's exceptions will be noted, and that the  
4 jury will be discharged.

5 MR. HOWELL: Your Honor, so that I may  
6 understand the Court's ruling, I understand the Court has  
7 noted my exception. There were three affirmative defenses,  
8 and the Court is ruling the motion to strike the plaintiff's  
9 evidence has been overruled; the plaintiff's motion to have  
10 this matter, count one coverage question, determined by the  
11 Court, and this has been granted; the Court has ruled that  
12 the defendant has not prevailed on any of the three affirmative  
13 defenses, and the Court has accordingly entered a judgment  
14 in whatever amount that turns out to be?

15 THE COURT: I thought I made that clear.

16 MR. HOWELL: Your decision was phrased primarily,  
17 if not solely, in terms of the property management exclusions,  
18 and there were two others set forth. I understand the effect  
19 of the Court's ruling, but I just wanted, for the purpose of  
20 the record, to understand that all three of them are being  
21 ruled on. So we will note our exception on all three of them.

22 THE COURT: It's the ruling of the Court that  
23 there was coverage; that, therefore, there was a duty to defend and  
24 to pay the judgment, and that the act which gave rise to the  
25 claims did not fall within any of the exclusions under the

1 evidence in the case.

2 MR. HOWELL: Your Honor, we would note our  
3 exception of the ruling, and the overruling of our motion to  
4 strike.

5 THE COURT: If you gentlemen are confident of  
6 the amount, if you would take a second to tell me what the  
7 specific amounts are from the evidence, I would just as soon  
8 go ahead and recite that for the record.

9 MR. NUSBAUM: We would like to do that, Your  
10 Honor.

11 Your Honor, I have one of these little pocket  
12 calculators and I will be glad to add that up.

13 THE COURT: It's not but a couple of figures.

14 All right. Let the record disclose that  
15 Mr. Howell -- I want to make sure this is not disputed. Let  
16 the record show, first of all, that the amount of the  
17 judgment and interest they were paid totalled \$36,878.10.  
18 The cost of defense, including expenses and attorney's fees,  
19 was the sum of \$1,358.18, which were the expenses, \$9,032  
20 attorney's fees. The sum of those three figures, less  
21 \$2,000, which is the deductible under the policy, would be  
22 the amount.

23 MR. HOWELL: Those are reflected by the  
24 evidence.

25 THE COURT: \$47,268.28. Reduce that by \$2,000.

\* \* \* TES

REGISTERED PROFESSIONAL REPORTERS  
NORFOLK, VIRGINIA



*Eph  
 TRUTH*

Agent W. L. ...

City Norfolk State VA

Is this direct business? Direct

**REAL ESTATE AGENTS ERRORS AND OMISSIONS APPLICATION**

**NOTICE TO APPLICANT**

This application is for "claims made" form of coverage. If a policy is issued, it will only cover claims arising from negligent acts, errors or omissions which occur subsequent to the retroactive date of the coverage being applied for; and then only to claims first made while coverage is in force. No coverage is afforded for claims first made after termination of insurance (either by cancellation or non-renewal) unless Reporting Endorsements are purchased.

1. Name of Applicant: S. L. Nusbaum & Company, Inc.  
If more than one applicant is named, attach separate sheet showing the relationship between each applicant and business or profession of each.
2. Address of Applicant: 922 Maritime Tower, P. O. Drawer 2491, Norfolk, Virginia, 23501

3. The Applicant is: ☐ Individual ☐ Partnership ☒ Corporation Date 1911  
Established or Incorporated

4. Give names of owners, officers, or partners, their respective titles, engaged in real estate business, and how long associated with the firm:

NAMES	TITLE	YEARS WITH FIRM
SEE ATTACHED LIST		

5. Total number of employees actually engaged in real estate operations exclusive of Item 4 34
6. Total number of salespersons paid on a commission or other basis and not included in Item 5 above:  
 Full Time N/A ; Part Time 1

7. Do you engage in the following activities?
- |  | No                                  | If yes, indicate Yes Gross Annual Income              |
|--|-------------------------------------|---|
| a. Real Estate Sales or listings   | <input type="checkbox"/>            | <input checked="" type="checkbox"/> \$ <u>95,757</u>  |
| b. Property Management   | <input type="checkbox"/>            | <input checked="" type="checkbox"/> \$ <u>884,040</u> |
| c. Real Estate Development <u>See attached</u>   | <input type="checkbox"/>            | <input checked="" type="checkbox"/> \$ <u>-0-</u>     |
| d. Underwriter, sponsor, partner, joint or co-venture or member in any real estate partnership, venture or syndicate | <input checked="" type="checkbox"/> | <input type="checkbox"/> \$ _____                     |
| e. Real Estate counseling for a fee  | <input checked="" type="checkbox"/> | <input type="checkbox"/> \$ _____                     |
| f. Real Estate appraising for a fee  |                                     |   |
| Residential  | <input checked="" type="checkbox"/> | <input type="checkbox"/> \$ _____                     |
| Commercial or Industrial   | <input checked="" type="checkbox"/> | <input type="checkbox"/> \$ _____                     |

*included - this  
 figures are  
 not*

*for*

CORP. 10 DEC 11 1979 HOME OFFICE

8. Do you want coverage extended (over your counseling or appraising exposure)? No Yes  
☐ ☒  
If yes, indicate all counseling or appraising societies of which you are a member:

Institute of Real Estate Management

American Institute of Real Estate Appraisers

*O.K. to include*

9. Do you understand and agree that the Real Estate Agents Errors and Omissions Coverage being applied for excludes coverage for property management, real estate development, and real estate ventures, partnerships or syndications? ☐ ☒
10. Have you ever been sued, or has any claim ever been made against you on account of errors or omissions as a real estate agent? ☒ ☐  
If yes, give particulars:

11. Do you have any knowledge or information of any occurrence whatsoever which might give rise to a claim against you in connection with your profession as a real estate agent? ☒ ☐
12. Has any company declined, cancelled or refused to renew similar insurance? ☒ ☐  
If yes, give particulars:

13. Have you complied with all laws of your state with respect to your business or profession as a real estate agency? ☐ ☒
14. Are you a member of any professional real estate agents organizations? ☐ ☒  
If yes, list all such organizations:

Norfolk/Chesapeake Board of Realtors

Virginia REal Estate Board

15. Amount of insurance desired:  
Each claim: ☐ \$100,000 ☐ \$200,000 ☐ \$250,000  
☐ \$500,000 ☐ \$1,000,000 ☒ Other, Quote \$100,000, \$500,000 & \$1,000,000  
Aggregate: Three times each claim limit.
16. Amount of Deductible each claim (Policy not written on full coverage basis)  
☐ \$1,000 ☐ \$1,500 ☒ \$2,000 ☐ \$2,500 ☐ \$5,000 ☐ Other, \_\_\_\_\_
17. Policy Effective Date: \_\_\_\_\_ (Annual policies only)

COPY TO  
DEC 11 1979  
HOME OFFICE

Date June 10, 1977

Signature

*Richard E. Living*  
Applicant

S. L. NUSBAUM & COMPANY, INC.

LIST OF OFFICERS

NAME	TITLE	YEARS WITH FIRM	YEARS IN REAL ESTATE BUSINESS
V. H. Nusbaum, Jr.	President	30	30
Stanley L. Harrison	Senior Vice President	27	27
Robert C. Nusbaum	Secretary-Treasurer	Advisory capacity only not actually engaged in business.	
Henry A. Shook	Senior Vice President	20	20
Richard E. Airing	Vice President/Controller	2	7
Everette G. Fowlkes, Sr.	Vice President	14	30
Walter Maskall	Vice President	16	16
Joseph Mersel	Vice President	9	15
Alan Nordlinger	Vice President	13	13
Alan B. Nusbaum	Vice President	2	2
Everette G. Fowlkes, Jr.	Asst. Vice President	9	9

COPY TO  
DEC 11 1979  
HOME OFFICE



TO: Mr. [unclear] 19

Tidewater Insurance Agency of Va., Inc.  
463 N. MILITARY HIGHWAY  
NORFOLK, VIRGINIA 23502  
Phone: 461-7125

SUBJECT: Sh. [unclear] + Co. Inc. 581 SH 3654

DATE: 6/19/77

FOLD ↑

Enclosed please find current information on a [unclear]  
Please quote 100,000, 500,000, 1,000,000 & [unclear] 2000  
Ded.

RECEIVED

JUN 21 1977

THE N. C. AREA  
CENTER

The Property Management Group is a [unclear] [unclear]  
group in that over 50% of "Managed" property is  
either owned in full or in part by insured. They  
also are named as additional named insured or as  
insured on all of their property.

They also understand that property management  
is excluded from coverage. Thanks

Larry [unclear]

[Signature]

SIGNED

PRINTED BY GRAYARC CO., INC., BROOKLYN, N. Y. 11232

COPY TO

DEC 11 1979

HOME OFFICE



REAL ESTATE AGENTS ERRORS AND OMISSIONS  
COVERAGE FORM - CLAIMS MADE

For attachment to the St. Paul Liability Policy

PART A

Not complete without

REVISIT

The following spaces preceded by an asterisk (\*) need not be completed if this coverage form and the Policy have the same inception date.

ATTACHED TO AND FORMING PART OF POLICY NO.	*EFFECTIVE DATE OF COVERAGE FORM	*ISSUED TO
581JM3458		

Subject to all of the provisions of this Coverage Form and the Policy to which it is attached, the Company agrees with the Insured as follows:

SCHEDULE

1. Name and Address of Insured (If other than as shown in Item 1 of Declarations)				
2. Limits of Liability		3. Retroactive Date Subject to Condition 1(a)	4. Deductible Amount	5. Premium
EACH CLAIM	AGGREGATE			
\$ 100,000 ✓	Three times the dollar amount shown	7/30/77 ✓	\$ 2,000 ✓	\$ 298. ✓
6. COVERAGE IS ALSO PROVIDED FOR THE CONDUCT OF THEIR BUSINESS OF EITHER OF THE FOLLOWING THAT IS MARKED WITH AN "X"				

☒ AS REAL ESTATE COUNSELORS

☒ AS APPRAISERS OF REAL PROPERTY

TO OUR POLICYHOLDERS

This is a "claims made" Coverage Form. It only covers claims arising from negligent acts, errors or omissions which occur subsequent to the retroactive date indicated and then only to claims first made within the provisions of the Policy while this Coverage Form is in force. No coverage is afforded for claims first made after the termination of this insurance unless and to the extent that Reports and Endorsements are purchased in accordance with Condition 3 of this Coverage Form. Please review the Policy carefully.

JAN 11 1980

RCVD 45G

JAN 10 1980 145

RCVD 45G

REVISED

AUTO CAS. DEPT.

The following spaces preceded by an asterisk (\*) need not be completed if this coverage form and the Policy have the same inception date.

ATTACHED TO AND FORMING  
PART OF POLICY NO.

\*EFFECTIVE DATE  
OF COVERAGE FORM

\*ISSUED TO

MAY 22 1978

581JM345B

D. MILLARD

Subject to all of the provisions of this Coverage Form and the Policy to which it is attached, the Company agrees with the Insured as follows:

## SCHEDULE

1. Name and Address of Insured (If other than as shown in Item 1 of Declarations)

2. Limits of Liability

EACH CLAIM

AGGREGATE

\$ 100,000.

Three times the  
dollar amount shown

3. Retroactive Date  
Subject to Condition 1(a)

7-30-77

4. Deductible Amount

\$ 2,000.

5. Premium

\$ 454.

6. COVERAGE IS ALSO PROVIDED FOR THE CONDUCT OF THEIR BUSINESS OF EITHER OF THE FOLLOWING THAT IS MARKED WITH AN "X".

☐ AS REAL ESTATE COUNSELORS

☒ AS APPRAISERS OF REAL PROPERTY

## TO OUR POLICYHOLDERS

This is a "claims made" Coverage Form. It only covers claims arising from negligent acts, errors or omissions which occur subsequent to the retroactive date indicated and then only to claims first made within the provisions of the Policy while this Coverage Form is in force. No coverage is afforded for claims first made after the termination of this insurance unless and to the extent that Reporting Endorsements are purchased in accordance with Condition 3 of this Coverage Form. Please review the Policy carefully.

25485 Ed. 8-76 Printed in U.S.A.

COMPANY COPY

JAN 11 1980

RCVD 45G

JAN 10 1980

RCVD 45G



PAGE 7

on behalf of the Insured all sums which the Insured shall become legally obligated to pay money damages (other than exemplary or punitive damages), because of any claim or claims first made against the Insured during the policy period, arising out of any negligent act or omission, occurring subsequent to the retroactive date, in the conduct of the Insured's business as real estate agents, and caused by the Insured or any other person for whose acts the Insured is legally liable, except as excluded or limited by the terms, conditions and exclusions applicable to this Coverage Form.

As excluded or limited by the terms, conditions and exclusions applicable to this Coverage Form, the Company shall have the right to defend in the Insured's name and behalf any suit or proceeding against the Insured alleging money damages (other than exemplary or punitive damages) which are payable under the terms of this Coverage Form, even if any of the allegations of the suit or proceeding are groundless, false or fraudulent, and the Company shall have the right to make such investigation and settlement of any claims, and any other proceedings arising in connection therewith as may be deemed expedient by the Company. The Company shall not be obligated to defend any claim, judgment or award, or undertake to continue defense of any suit or proceeding after the limit of the Company's liability has been exhausted by payment of judgments, awards or settlements.

#### Exclusions

Coverage Form and the insurance provided hereby shall not apply to any claim, or any suits or proceedings arising in connection therewith, nor the defense thereof nor the payment of any amount with respect thereto, if and to the extent the claim:

- arises out of or in connection with any dishonesty, intentional fraud, criminal or malicious act, libel or slander;
- arises out of or in connection with any bodily injury to, or sickness, disease or death of any person, or injury to or destruction of any tangible property including the loss of use thereof;
- arises out of or in connection with the failure to effect or maintain adequate insurance;
- arises out of or in connection with operations performed by the Insured under a written management agreement or any situation where the Insured acts in a supervisory capacity for a building owner;
- arises out of or in connection with the management or sale of property developed, constructed or owned by the Insured, or any firm or corporation in which the Insured has a financial interest, or by any firm coming under the same financial control as the Named Insured;
- arises out of or in connection with any Insured's activities as an underwriter, sponsor, partner, joint or co-venturer or member in any real estate partnership, venture or syndicate;
- arises out of or in connection with any allegation of fraud or misrepresentation under state or federal law concerning the purchase or sale of securities.

#### DEDUCTIBLE

It is agreed that the Company's obligation to pay money damages on behalf of the Insured applies only to the amount of money damages in excess of any deductible amount stated in the Schedule.

The terms of the Policy, including those with respect to (a) the Company's rights and duties with respect to the defense of suits or proceedings and (b) the Insured's duties in the event of an occurrence, apply irrespective of the application of the deductible amount.

The Company may pay any part or all of the deductible amount to effect settlement of any claim or suit or proceeding arising in connection therewith, and upon notification of the action taken, the Named Insured shall promptly reimburse the Company for such part of the deductible amount as has been paid by the Company.

#### PERSONS INSURED

Each of the following is an Insured to the extent set forth below:

- (a) if the Named Insured designated in the Schedule of this Coverage Form is an individual, the person so designated;
- (b) if the Named Insured designated in the Schedule of this Coverage Form is a partnership, the partnership so designated and any partner thereof but only with respect to their liability as such;
- (c) if the Named Insured designated in the Schedule of this Coverage Form is other than an individual or partnership, the organization so designated and any executive officer, director or stockholder thereof but only while acting within the scope of their duties as such;
- (d) any person who is an employee of the Named Insured but only while acting within the scope of their duties as such;
- (e) any person who previously qualified as an Insured under subparagraphs III. (b), (c) or (d) of this Coverage Form prior to termination of the required relationship with the Named Insured but only for negligent acts, errors or omissions which occurred subsequent to the retroactive date applicable to the individual person and prior to the termination of such relationship.

#### POLICY PERIOD-TERRITORY

This Coverage Form and the insurance provided hereby only applies to negligent acts, errors or omissions which occur within the United States of America, its territories or possessions or Canada subsequent to the retroactive date stated in the Schedule and then only if claim is first made during the policy period or a reporting period purchased in accordance with Condition 3.

The following provisions shall apply in determining whether a claim is first made during the policy period or a reporting period:

- (a) If during the policy period or a reporting period (if purchased) the Insured shall have knowledge or become aware of any negligent act, error or omission covered hereby, which may subsequently give rise to a claim and shall, during the policy period or such reporting period, give written notice thereof to the Company in accordance with Condition 5(b) (1) of this Coverage Form, then such notice shall be considered a claim made hereunder within the policy period or such reporting period.

JAN 10 1980

RCVD 45G

JAN 11 1980

RCVD 45G

# RENEWAL CERTIFICATE

RENEWAL PERIOD		TYPE OF POLICY		POLICY NO.	
From	To				
7-30-79	7-30-80	Professional Liability		581JM3458	
Prepaid Renewal Premium:		Sum Insured	If policy is on a 3 year installment basis, premium is payable:		
Property	Gen. Liability	(If Changed)	At Inception	2nd Year	3rd Year
\$	\$ 454.	\$	\$	\$	\$

NAME AND MAILING ADDRESS OF INSURED

S.L. Nusbaum & Company, Inc.  
922 Maritime Tower,  
PO Drawer 2491  
Norfolk, VA 23501

For Casualty Department Use Only	
AUDIT	INSPECTION
Annual	Requested
Interim	Ordered
Canc'd.	Canc'd.

In consideration of the renewal premium the above numbered policy is renewed for the period specified, subject to the terms and conditions thereof, except as hereinafter provided:

Exceptions:

JAN 10 1980  
~~RCVD 45G~~

If during the policy period (prior to the issuance of this Certificate), the Company's rules were revised so as to extend or broaden the insurance afforded by said policy without additional premium, such extended or broadened insurance shall inure to the benefit of the Insured under this Renewal Certificate.

IN WITNESS WHEREOF, the Company has caused this Certificate to be signed by its President and Secretary but this Certificate shall not be valid unless countersigned by a duly authorized representative of the Company.

*J. S. Franklin*  
Secretary

*Robert H. Hough*  
President

AGENCY NAME AND ADDRESS

Tidewater Ins. Agency, Inc.  
PO Box 12186  
Norfolk, VA 23502  
450259-5

JAN 11 1980  
~~RCVD 45G~~

Authorized Representative	
6/6/79 ph	
Countersign Date	Countersigned At

148



# RENEWAL CERTIFICATE

AUTO-CAS DEPT.

RENEWAL PERIOD From 7-30-78 To 7-30-79		TYPE OF POLICY Professional Liability		POLICY NO. 1978 581JM345B	
Prepaid Renewal Premium: Property	Gen. Liability 454.	Automobile	Sum Insured (If Changed)	If policy is on a 3 year installment basis, premium is payable. At Inception 2nd Year 3rd Year	
\$	\$	\$	\$	\$	\$

NAME AND MAILING ADDRESS OF INSURED

S. L. Nusbaum & Co., Inc.  
922 Maritime Tower  
P. O. Drawer 2491  
Norfolk, VA 23501

For Casualty Department Use Only	
AUDIT	INSPECTION
Annual	Requested
Interim	Ordered
Canc'd.	Canc'd.

In consideration of the renewal premium the above numbered policy is renewed for the period specified, subject to the terms and conditions thereof, except as hereinafter provided:

Exceptions:

JAN 10 1980  
RCVD 45G

If during the policy period (prior to the issuance of this Certificate), the Company's rules were revised so as to extend or broaden the insurance afforded by said policy without additional premium, such extended or broadened insurance shall inure to the benefit of the Insured under this Renewal Certificate.

IN WITNESS WHEREOF, the Company has caused this Certificate to be signed by its President and Secretary but this Certificate shall not be valid unless countersigned by a duly authorized representative of the Company.

*[Signature]*  
Secretary

*[Signature]*  
President

AGENCY NAME AND ADDRESS

Tidewater Insurance Agency, Inc.  
P. O. Box 12186  
Norfolk, VA 23502  
450259

Authorized Representative  
5-19-78 CDH

Countersign Date Countersigned At

149



or omissions shall be considered part of the claim which was first made during the policy period or such reporting period.  
A claim shall be considered to be first made when the Company first receives notice of the claim or of an occurrence which may subsequently give rise to a claim. (see Condition 3 for Insured's rights to have Reporting Endorsements Issued.)

## CONDITIONS

### 1. DEFINITIONS

- (a) "Retroactive date" means the date shown in Item 3 of the Schedule of this Coverage Form. However, with respect to an Insured who becomes an Insured under this Coverage Form subsequent to the retroactive date shown in Item 3 of the Schedule, the retroactive date for that Insured shall be the same as that subsequent date.
- (b) "Policy Period" means the period of coverage commencing on the retroactive date shown in Item 3 of the Schedule of this Coverage Form and ending upon the effective date of termination, expiration or cancellation of coverage under this Coverage Form, and specifically excludes any reporting period purchased hereunder.
- (c) "Policy year" means each consecutive annual period of the policy to which this Coverage Form is attached.
- (d) "Reporting period" means the period of time stated in the "reporting endorsement" for reporting claims or suits or proceedings arising in connection therewith, which arise out of negligent acts, errors or omissions which occur subsequent to the retroactive date and prior to the end of the policy period.

### LIMIT OF LIABILITY

The Limit of Liability stated in the Schedule as applicable to "each claim" is the limit of the Company's liability for all money damages arising out of the same or related negligent acts, errors or omissions without regard to the number of claims, demands, suits, proceedings or claimants. If additional claims are subsequently made which arise out of the same or related negligent acts, errors or omissions as a claim already made, all such claims, whenever made, shall be considered first made within the policy year or reporting period in which the earliest claim arising out of such negligent acts, errors or omissions was first made, and all such claims shall be subject to the same limit of liability.

If the Named Insured applies for reporting period(s) in accordance with Condition 3, the limit of liability stated in the Schedule as applicable to "each claim", at the time the policy is terminated, is the limit of the Company's liability for all claims arising out of the same or related negligent acts, errors or omissions, which are first made during each reporting period.

The limit of liability stated in the Schedule as "aggregate" (which amount shall be three times the dollar amount shown in Item 2 of the Schedule of this Coverage Form) is, subject to the above provisions respecting "each claim", the total limit of the Company's liability for all money damages and claims expenses arising out of claims first made during each policy year or during each reporting period.

The inclusion in the Coverage Form of more than one Insured shall not operate to increase the limits of the Company's liability.

### REPORTING ENDORSEMENT

In the event of termination of insurance either by non-renewal or cancellation of this policy, or termination of a reporting period the Named Insured shall have the right upon payment of an additional premium (to be computed in accordance with the Company's rules, rates, ratings and premiums applicable on the effective date of the endorsement) to have issued an endorsement(s) providing additional reporting period(s) in which claims otherwise covered by this policy may be reported. The limits of liability shown in Item 2 of the Schedule of the Coverage Form at the time this insurance is terminated shall be the limits applicable to each reporting period. Such right hereunder must however, be exercised by the Named Insured by written notice not later than thirty (30) days after such termination date.

### 4. ARBITRATION

The Company shall be entitled to exercise all of the Insured's rights in the choice of arbitrators and in the conduct of any arbitration proceeding involving a claim covered by this Coverage Form.

### 5. AMENDED POLICY CONDITIONS

- (a) Condition 1, 2 and 3 do not apply to this Coverage Form.

- (b) Condition 4 is amended to read:

Insured's Duties in the event of an Occurrence, Claim or Suit or Proceeding.

1. Upon any Insured obtaining knowledge or becoming aware of any negligent acts, errors or omissions which may subsequently give rise to a claim against any Insured, written notice containing the fullest information obtainable with respect to the circumstances out of which it arose, including the names and addresses of the clients served, the nature and extent of the services rendered and which should have been rendered and the nature and extent of the type of claim or claims anticipated, shall be given by or for the Insured to the Company or any of its authorized agents as soon as practicable.
2. If any claim is made or any suit or proceeding arising in connection therewith is brought against any Insured, the Insured shall immediately notify the Company of the nature and extent of each and every threat, or advice of any intention to hold any Insured liable, and every demand, notice summons or other process received by any Insured or any Insured's representative, and shall immediately forward to the Company copies of any of the foregoing which are in writing.
3. The Insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits and proceedings arising in connection therewith and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Insured because of damages with respect to which insurance is afforded under this policy; and the Insured shall attend hearings, trials and proceedings and assist in securing and giving evidence and obtaining the attendance of witnesses. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expenses.

- (c) Condition 6 is amended to read:

Other Insurance

If the Insured has other insurance against a claim covered by this Policy the Company shall not be liable under this Policy for a greater proportion of such claim than the limit of liability stated in the Schedule bears to the total limit of liability of all valid and collectible insurance against such claim.

- (d) Condition 7 is amended to read:

Subrogation

In the event of any payment under this Coverage Form the Company shall be subrogated to the extent of such payment to all the Insured's rights of recovery therefor against any person or organization (excluding employees of the Insured) and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure the Company's rights. The Insured shall do nothing after loss to prejudice such rights.

JAN 10 1960

RCVD 45G





Property & Liability  
Insurance

August 23, 1979

**Personal and Confidential**

Mr. V. H. Nusbaum, Jr.  
S. L. Nusbaum & Company, Inc.  
922 Maritime Tower  
P. O. Drawer 2491  
Norfolk, Virginia 23501

Re: Claim Number: 581JM3458 45G 001  
Insured: S. L. Nusbaum & Co., Inc.  
Claimant: Brady Investment Corporation  
Date of Loss: January 30, 1979

Dear Mr. Nusbaum:

It has recently come to my attention that several of the owners of S. L. Nusbaum and Company also enjoy financial interest in SuSu Developers, a general partnership. That being the case, there is a serious question of coverage. Accordingly, we are willing to go forth with the investigation and/or handling of this claim-suit with the express understanding that by proceeding in this manner, we are not waiving any of the Company's rights under the policy to deny coverage to you. Obviously, nothing in this letter precludes you from alleging that the coverage does inure to your benefit.

In order to resolve the question of coverage, I would like to know what management agreement you have with SuSu Developers, and whether any executive officer, director, stockholder, employee or salesperson of S. L. Nusbaum has a financial interest in SuSu Developers.

Your early attention to this matter would be greatly appreciated.

Very truly yours,

W. M. Rigsbee, Jr.  
Claims Manager

WMR/gw

cc: Robert G. Doumar  
Doumar, Pincus, Knight & Harlan

COPY 10

DEC 11 1979

HOME OFFICE

St. Paul Fire and Marine Insurance Company  
Virginia Beach Claim Office  
Pembroke Six Suite 202  
Pembroke Office Park  
Virginia Beach, Virginia 23462  
Phone: (804) 499-5494



Property & Liability  
Insurance

October 1, 1979

Dianne F. Rowe  
Administrative Manager  
S. L. Nusbaum & Company, Inc.  
P. O. Drawer 2491  
Norfolk, Virginia 23501

Re: Claim Number: 581JM3458 45G 001  
Insured: S. L. Nusbaum & Company, Inc.  
Claimant: Brady Investment Corporation  
Date of Loss: January 30, 1979

Dear Ms. Rowe:

Thank you for your letter of September 18, 1979 in which you set forth the management provisions of the contract between S. L. Nusbaum & Company, Inc. and SuSu Developers and Hilltop North Shopping Center. As you know, we have proceeded under a reservation of rights relative to the question of your management of this property for the building owner. It now appears that exclusion (d) of the Real Estate Agents Errors and Omissions Coverage Form would be applicable to this claim. Specifically, it reads that the insurance provided under the policy shall not apply to any claim... "if and to the extent the claim: (d) arises out of or in connection with operations performed by the Insured under a written management agreement or any situation where the Insured acts in a supervisory capacity for a building owner;".

Accordingly, we do not feel that we will be obligated to provide a defense for the litigation filed by Brady Investment Corporation from this point forward. By copy of this letter, I am informing Robert Doumar that unless you wish to keep him as your own counsel, that he may withdraw from the handling of this suit on our behalf. Of course, we will pay any legal expense arising out of Mr. Doumar's services to this point. I am sure that Mr. Doumar will make necessary arrangements to make a smooth transition to your own counsel.

If you have any questions arising out of this denial of coverage, please get in touch with me promptly. I might point out for your information that under the owner's Comprehensive General Liability policy, S.L. Nusbaum may be an insured to the extent of their management of the property. You may wish to check this out to see if coverage is provided there.

Very truly yours,

152

W. M. Rigsbee, Jr.  
Claims Manager

Property and Liability Affiliates of The St. Paul Companies Inc.: St. Paul Fire and Marine Insurance Company / St. Paul Mercury Insurance Company  
The St. Paul Insurance Company / St. Paul Guardian Insurance Company / The St. Paul Insurance Company of Illinois



Ms. Rowe

- 2 -

October 1, 1979

WMR/gw

cc: V. H. Nusbaum, Jr.  
S. L. Nusbaum & Company, Inc.

cc: Robert G. Doumar  
Doumar, Pincus, Knight & Harlan

cc: Tidewater Insurance Agency

153 Paul

S. L. NUSBAUM

Insurance Agency, Inc.

Eph 14  
TRMWH

BERTRAM S. NUSBAUM, JR., C.P.C.U.

V. H. NUSBAUM, JR.

SAM LIPKIN (1902 - 1974)

ROBERT W. O'SULLIVAN

CHARLES B. PATTON

CHARLES S. NUSBAUM

1018 MARITIME TOWER

POST OFFICE BOX 1708

NORFOLK, VIRGINIA 23501

PHONE 804 - 622-4653

CABLE: NUSBAUMINS

7/12/77

July 11, 1977

Mr. Alan Nusbaum  
S. L. Nusbaum & Co., Inc.  
922 Maritime Tower  
Norfolk, Virginia 23510

Dear Alan:

I would like to call to your attention the exclusions found in Part B of your new Errors and Omissions contract as provided by the St. Paul #581JH3654.

First of all you should address a letter to Tidewater Insurance Agency of Virginia, Inc., 463 N. Military Highway, Norfolk, Va. 23502, acknowledging receipt of this policy and that you understand that property management is excluded under Claims-made policy.

In order to take up some of this gap, the following are musts:

- I - You should secure an endorsement on the public liability and property coverages on each parcel of property, which you manage, paying particular attention to exclusions "A" through "G".
- II- The contracts providing coverage for the owners should carry contractual liability coverage. You should negotiate these contracts whereby the owner will hold you harmless as the agent. In other words, you want to create an agency situation whereby you actually become an arm of the owner and are covered under his insurance contracts.
- III- In those instances where you are a part of the development, then you can see that a hold harmless clause is directed on your behalf and that you are definitely a named insured and coverage is provided not only for the operations of the premises, but also blanket contractual coverage.

Should you need any further explanation of this, please call me.

Very truly yours,

S. L. NUSBAUM INS. AGENCY, INC.

154



*Alan Nusbaum*

*Edw's TRW*

MARITIME TOWER • P. O. DRAWER 2-191 • NORFOLK, VIRGINIA 23501 • (804) 627-8611

## S. L. NUSBAUM & COMPANY, INC. REALTORS

REAL ESTATE • INSURANCE • PROPERTY MANAGEMENT

July 27, 1977

Mr. Larry Perse  
Tidewater Insurance Agency of Virginia, Inc.  
463 N. Military Highway  
Norfolk, Virginia 23502

Dear Mr. Perse:

As per our application of our new Errors and Omissions insurance policy for S. L. Nusbaum & Company, Inc., we accept the policy with the understanding that property management is excluded under Claims-made policy. We are awaiting delivery of this policy as soon as possible.

Very truly yours,

*Richard E. Airing*

Richard E. Airing  
Vice-President/Controller

REA:jb

cc: Mr. Bertram S. Nusbaum, Jr.

*Von*

ST. PAUL FIRE AND MARINE  
ST. PAUL MERCURY

AUG 03 1977

RANDY COLTHORPE  
AUTO CASUALTY  
THE D. C. AREA LI VING CENTER

COPY TO

DEC 11 1979

HOME OFFICE



17  
TRW  
MARITIME TOWER • P. O. DRAWER 2491 • NORFOLK, VIRGINIA 23501 • (804) 627-8611

## S. L. NUSBAUM & COMPANY, INC.

REALTORS: REAL ESTATE • INSURANCE • PROPERTY MANAGEMENT

August 29, 1979

W.M. Rigsbee, Claim Manager  
St. Paul Fire & Marine Insurance Company  
Virginia Beach Claims Office  
Pembroke Six Suite 202  
Pembroke Office Park  
Virginia Beach, Virginia 23462

Dear Mr. Rigsbee:

Per your letter of August 23, 1979 to Mr. V.H. Nusbaum, Jr., we enclose a copy of the partnership distribution of Su-Su Developers. The underlined are stockholders or officers of S.L. Nusbaum & Company, Inc.

If you need any other information, do not hesitate to contact this office.

Yours very truly,

S.L. NUSBAUM & CO., INC.

*Dianne F. Rowe*

Dianne F. Rowe  
Administration Manager

DFR/daw  
Enclosure

ST. PAUL FIRE & MARINE INS. CO.  
VIRGINIA BEACH, VA OFFICE

cc: V.H. Nusbaum, Jr.  
cc: Robert G. Doumar, Doumar, Pincus, Knight & Harlan JUL 30 1979

W. M. RIGSBEE, JR.  
CLAIM MANAGER

COPY TO

DEC 11 1979

HOME OFFICE

AUG 30 1979

RCVD 45G

WHEREAS, Pursuant to Section 11 of the Partnership Agreement, Isabelle L. Horne has asked to be admitted as a general partner in SuSu Developers, and SuSu Co., has requested that the partners consent to the aforesaid decrease in its partnership interest;

NOW, THEREFORE, WITNESSETH:

All partners of SuSu Developers hereby agree to admit Isabelle L. Horne as general partner of SuSu Developers and agree to the decrease in the partnership interest of SuSu Co. Henceforth the profits and losses shall be divided as follows:

<u>Alan L. Nordlinger, Jr.</u>	29.75%
<u>Henry A. Shook</u>	27.00%
<u>V. H. Nusbaum, Jr.</u>	9.00%
<u>Stanley L. Harrison</u>	12.25%
<u>SuSu Co. (COMPANY)</u>	1.00%
<u>Robert C. Nusbaum</u>	3.00%
Lottie S. Colton	2.00%
V. R. Colton	2.00%
Alan J. Hofheimer	1.00%
T. Lane Stokes	2.00%
T. Lane Stokes, Jr.	1.00%
John Randolph Stokes	1.00%
Martha K. Stokes and T. Lane Stokes, Jr., Trustees of the Gordon K. Stokes Trust	1.00%
Martha K. Stokes and T. Lane Stokes, Jr., Trustees of the Ann P. Stokes Trust	1.00%

COPY TO  
DEC 11 1979  
HOME OFFICE

AUG 30 1979  
RCVD 45G

Lois S. Nusbaum	0.5%
Charles S. Nusbaum	0.33 - 1/3%
Beth Nusbaum Curtiss	0.33 - 1/3%
Lois S. Nusbaum, Trustee of the Silberman Children's Trust	0.33 - 1/3%
Edythe G. Salzberg	1.00%
Bernard Salzberg	1.00%
George Ginsburg	1.00%
Thomas H. Watts	1.00%
Isabelle L. Horne	1.00%

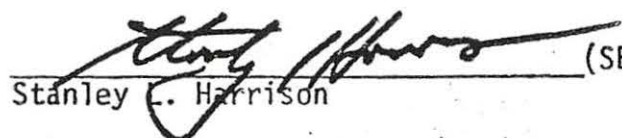
All partners hereby consent to make the original adjustment to basis in accordance with Sections 743 and 754 of the Internal Revenue Code of 1954, in order to reflect the reinvestment of Isabelle L. Horne in the partnership.

In all other aspects we do hereby ratify and confirm the said Partnership Agreement dated August 12, 1970, and amended.


WITNESS our signatures and seals this 1st day of July, 1979.

 (SEAL)  
Alan L. Nordlinger

 (SEAL)  
Henry A. Shook

 (SEAL)  
Stanley C. Harrison

\_\_\_\_ (SEAL)  
Robert C. Nusbaum

  
U.H. Nusbaum Jr.

COPY TO  
DEC 11 1979  
HOME OFFICE  
AUG 30 1979  
RCVD 45G





Property & Liability  
Insurance

*Elb 18  
TRM*

September 11, 1979

Dianne P. Rowe  
Administration Manager  
S. L. Nusbaum & Company, Inc.  
P. O. Drawer 2491  
Norfolk, Virginia 23501

Re:      Claim Number:      581JM3458 45G 001  
         Insured:              S. L. Nusbaum & Company, Inc.  
         Claimant:             Brady Investment Corporation  
         Date of Loss:         January 30, 1979

Dear Ms. Rowe:

Thank you for your letter of August 29, 1979 in which you forwarded a copy of the partnership distribution of Su-Su Developers. You apparently overlooked forwarding a copy of the management contract with Su-Su Developers on Hilltop Shopping Center, and I would appreciate a copy of it as promptly as possible.

Thank you for your continued help and cooperation.

Very truly yours,

W. M. Rigbee, Jr.  
Claim Manager

WMR/gw

COPY TO  
DEC 11 1979  
HOME OFFICE

3458-001  
Eib 19  
TTC USH

MARITIME TOWER • P. O. DRAWER 2491 • NORFOLK, VIRGINIA 23501 • (804) 627-8811

## S. L. NUSBAUM & COMPANY, INC.

REALTORS: REAL ESTATE • INSURANCE • PROPERTY MANAGEMENT

September 18, 1979

Mr. W.M. Rigsbee, Jr.  
Claim Manager  
The St. Paul Fire & Marine  
Insurance Company  
Pembroke Six, Suite 202  
Pembroke Office Park  
Virginia Beach, Virginia 23462

Dear Mr. Rigsbee:

Your letter of September 11, 1979 requests a copy of the management contract between SuSu Developers and Hilltop North Shopping Center. There is no written agreement, however, the terms of the verbal contract are as follows:

- (a) A 4% commission, (on gross collections, excluding security deposits), is the monthly management fee.
- (b) The center is leased and maintained by S.L. Nusbaum and Company which includes: collection of rents and applicable taxes and utilities, maintenance of grounds and overall structures, payment of all bills for services provided to cover above and execution of all renewal leases and new leases for all units.

If you need more detailed or any additional information, please do not hesitate to contact me.

Very truly yours,

S.L. NUSBAUM AND CO., INC.

*Dianne F. Rowe*

Dianne F. Rowe  
Administrative Manager

COPY TO

DEC 11 1979

HOME OFFICE

SEP 19 1979

RCVD 45G

DFR/jp

cc: Mr. V.H. Nusbaum  
Mr. Alan L. Nordlinger

HOFHEIMER, NUSBAUM & McP...  
100 Plaza One  
Norfolk, Virginia 23510

FILE COPY

Ellis 26  
TR 11/5/71

THIS PARTNERSHIP AGREEMENT, Made this 12th day of August, 1970, by and between SUSU CO., a Virginia corporation, V. H. NUSBAUM, JR., HENRY A. SHOOK, STANLEY L. HARRISON, ALAN L. NORDLINGER, JR. and MICHAEL RESH, first parties, and S. L. NUSBAUM & COMPANY, INC., a Virginia corporation, second party;

WHEREAS, first parties have negotiated for and obtained a valuable option for a ground lease upon certain land on the northern side of Laskin Road, east of First Colonial Road, in the City of Virginia Beach, Virginia, for the purpose of causing a shopping center to be erected thereon; and

WHEREAS, the said option has been titled for convenience in the name of second party, but is owned by first parties in the same proportion in which they shall contribute capital and share profits and losses hereunder, as more fully set forth below; and

WHEREAS, the first parties desire to form a general partnership and to contribute thereto as its initial capital their respective interests in said option;

NOW, THEREFORE, WITNESSETH:

That for and in consideration of each other's undertakings and the mutual benefits expected to ensue herefrom, the first parties agree and enter into Articles of Partnership as follows:



1. FORMATION OF PARTNERSHIP. The first parties do hereby associate as general partners to form a general partnership to invest in and develop a shopping center in the City of Virginia Beach, Virginia, upon the real estate mentioned above, to be leased from Lucille B. Potter, et al, pursuant to Ground Lease bearing date on August 12, 1970, to be delivered from escrow upon exercise of the aforementioned option.

2. NAME AND LOCATION. The name of the firm is to be SuSu Developers. The principal office is to be at 922 Maritime Tower, Norfolk, Virginia, until changed by agreement of partners owning a majority in interest in the firm.

3. TERM. The partnership shall begin on the date of these presents, and shall continue until its affairs are wound up as a result of the sale of its assets, but neither the death nor retirement of a partner nor the admission of a new partner is intended to cause a termination, it being intended and agreed that the firm, as constituted after such event, shall carry on the partnership business until partners owning more than fifty percent (50%) in interest shall agree to dissolve and liquidate the firm.

4. INITIAL CAPITAL. The initial capital of the firm shall consist of the foregoing option, valued at \$1.00 in excess of the sum of \$10,000 borrowed from second party to pay for the same.

5. FINANCING OF OPERATIONS. The partners agree to use construction loan proceeds and other borrowed funds to fund as much of the firm's operations and development expense as is feasible. Funds required prior to the availability of a construction loan shall be loaned or contributed to the firm by the partners in the same proportion that they share profits and losses.

6. PROFITS AND LOSSES. The profits and losses of the firm shall be shared, and the net cash flow available from time to time for distribution shall be distributed, among the partners in the proportions shown on Schedule A attached hereto and made a part hereof.

7. SECOND PARTY'S EXCLUSIVE RIGHT. All parties hereto agree that the second party shall have the exclusive right, as agent for the firm, for a period of twenty-six (26) years herefrom, during the firm's ownership of said shopping center, to serve as sole leasing agent and managing agent of the shopping center. Second party shall receive as compensation for such services a commission of six percent (6%) of all base rents, percentage rents and common area maintenance charges and other such revenues (not including real estate taxes, business taxes and reimbursement therefor) paid to or for the account of the firm on leases negotiated by second party or others during such period. During such period, second party shall have the exclusive right to sell said shopping center, at compensation to be determined by arbitration if not mutually agreed, but no sale shall be binding upon the firm without its prior written consent of the price, terms and purchaser. 163

8. INSURANCE. The parties agree to carry hazard and liability insurance as required by the aforesaid Ground Lease and other instruments binding upon the firm, and that while the second party continues to own an interest in S. L. Nusbaum Insurance Agency, Inc., such coverages will be placed with said agency as long as they are written at rates reasonably competitive with the market.

9. OVERDRAFT. If the parties overdraw their capital accounts, they shall do so ratably. Overdrafts of capital accounts shall not require payment of interest, except to the extent that a partner's overdraft is greater, in proportion to his interest in the profits, than the overdrafts of others in proportion to their respective shares of profits.

10. TAX EFFECT OF DEATH. The death of a partner shall not cause a dissolution of the firm for tax purposes nor a termination of the taxable year.

11. SUCCESSORS. No partner shall sell his interest in the firm without first offering it in writing to the remaining partners at the price and on the terms at and on which a purchaser has offered to buy. No partner shall sell or assign his interest in the firm without the written consent of at least 60% of the other partners if such sale or assignment would work a dissolution of the firm for federal income tax purposes. In the event of the death of a partner, his personal representatives and distributees shall have the right, upon reasonable notice, to participate as a general partner in the lieu and stead of the decedent, with the same capital account and share of profits and losses as the decedent. To the



fullest extent permitted by law, the liability of a fiduciary participating hereunder as a general partner shall be limited to the assets held by him in his fiduciary capacity.

12. WINDING UP. Upon termination of the partnership for any reason, the partners then remaining shall designate by a vote of the majority in interest two of their number to serve jointly as liquidating partners. The two so designated shall jointly liquidate and wind up the affairs of the firm and make an accounting thereof to the other partners and to any others entitled thereto. The liquidating partners shall serve as such without pay, but shall be entitled to take their expenses, if any, from the proceeds of liquidation.

13. POWER TO CONVEY AND CONTRACT; AGENCY. Contracts, deeds, options, agreements, leases, subleases, notes, deeds of trust and other legal instruments executed by the firm or in its name shall be valid and binding upon it when executed by SuSu Co., which is hereby appointed as agent and attorney-in-fact for the firm to sign the partnership name, and if required, the names of the partners, to any such instrument in the furtherance of the business of the firm.

14. BOOKS OF ACCOUNT. The firm shall cause books of account to be established for it by a certified public accountant, who shall prepare and distribute a complete financial statement to the partners each year. The books shall be maintained at the office of the firm and shall be open for inspection by the partners during business hours. Checks of

the firm shall be valid only when signed by Alan L. Nordlinger, Jr. or by any two of the other individual partners named herein.

15. COMMITMENTS AND LEASES. The partners agree that SuSu Co. shall have full power and authority, on behalf of the firm and in its name to approve, accept and execute (a) mortgage loan applications and commitments for construction loans and permanent loans, (b) leases and subleases of every kind, (c) easements and (d) contracts.

WITNESS the following signatures and seals:

SUSU CO.

ATTEST:

By /s/ Alan L. Nordlinger, Jr.  
President

/s/ Robert C. Nusbaum  
Secretary

/s/ V. H. Nusbaum, Jr. (SEAL)  
V. H. Nusbaum, Jr.

/s/ Henry A. Shook (SEAL)  
Henry A. Shook

/s/ Stanley L. Harrison (SEAL)  
Stanley L. Harrison

/s/ Alan L. Nordlinger, Jr. (SEAL)  
Alan L. Nordlinger, Jr.

/s/ Michael Resh (SEAL)  
Michael Resh

S. L. NUSBAUM & COMPANY, INC.

ATTEST:

By /s/ V. H. Nusbaum, Jr.  
President

/s/ Robert C. Nusbaum  
Secretary

E/A D-1  
TCTWJ

STOCKHOLDERS

Stanley L. Harrison	Alan B. Nusbaum
Joseph Mersel	Robert C. Nusbaum
Alan L. Nordlinger	V. H. Nusbaum, Jr.
Henry A. Shook	

CHAIRMAN OF  
THE BOARD

V. H. Nusbaum, Jr.

BOARD OF  
DIRECTORS

Stanley L. Harrison	Alan B. Nusbaum
Joseph Mersel	Robert C. Nusbaum
Alan L. Nordlinger	V. H. Nusbaum, Jr.
Henry A. Shook	

PRESIDENT

Alan B. Nusbaum

Director of Commercial Leasing	Director of Commercial Management	Vice President/ Controller	Administration Manager	Director of Apartments	Director of Sales
Richard M. Jacobson	Andrew S. Gladstone	Richard E. Airing	Dianne F. Rowe	Stanley L. Harrison	Alan B. Nusbaum

Chief of  
Maintenance

Thomas D. Swain, III

Data Processing  
Manager

Charles S. O'Rourke, III

Accounting  
Supervisor

Linda M. Exum