

# Client Alert

March 2014

## Two-Year Suit Limitation Clause Found Unreasonable And Unenforceable Where Loss Continues Beyond The Limitations Period

In *Executive Plaza, LLC v. Peerless Ins. Co.*, --- N.E.3d ---, 2014 WL 551251 (Feb. 13, 2014 N.Y.), the New York Court of Appeals refused to enforce a two-year suit limitation against a policyholder where doing so would require that suit be filed before the loss was complete. The court also held that to preclude the policyholder from suing to enforce a claim that matures after the limitation period has expired would render the policy “valueless.”

### BACKGROUND

Executive Plaza, LLC (“Executive”) owned an office building in Island Park, New York, which was destroyed by fire. Executive was insured under a property insurance policy issued by Peerless Insurance Company (“Peerless”). The policy had a \$1 million limit for loss or damage caused by fire.

Following the fire, Executive submitted a claim and Peerless paid Executive \$750,000, representing the “actual cash value” of the damaged building. Executive notified Peerless that it would also make a “replacement cost” claim for the remainder of the policy limit. Peerless advised that, under the policy, “replacement cost” coverage requires “documentation verifying the completion of repairs” as a condition to receiving payment. The policy also contained a suit limitation provision purporting to preclude any lawsuit from being brought against Peerless based on a claim under the policy more than two years after the date of fire.

To protect its rights under the policy, Executive filed a declaratory judgment action against Peerless in New York state court on the two-year anniversary of the fire — the last day allowed by the suit limitation provision. Executive alleged that Peerless had not yet paid the additional replacement cost even though, despite reasonable efforts, Executive was unable to replace the destroyed building within two years of the fire. After Peerless removed the case to federal court, the court dismissed the case as premature.

Executive completed the repairs and rebuilding in October of 2010, roughly three and a half years after the fire. As required under the policy, Executive then sought the remainder of its policy limit from Peerless. Peerless again denied the claim; Executive again filed suit in New York state court and Peerless again removed the case to federal court. The district court again dismissed the lawsuit, this time based on the two-year suit limitation provision, finding the lawsuit untimely since it was brought more than two years after the date of the fire.

Executive appealed the dismissal to the Second Circuit, which certified to the New York Court of Appeals the question, “is an insured covered for replacement costs if the insured property cannot reasonably be replaced within the time specified by the suit limitations provision?”

### HOLDING

The New York Court of Appeals accepted the certified question and, under the facts of the case,

answered in the affirmative. The court recognized the generally accepted principle that parties may shorten applicable statutes of limitation if they do so reasonably. The court further explained that two-year suit limitation provisions are not “inherently unreasonable” and, in fact, have been enforced by New York courts. The court then went on to address the specific facts that rendered the Peerless limitation provision unreasonable.

As the court explained, the unreasonableness of Peerless’s suit limitation was not its length; it was the accrual date and the manner in which it was applied to a loss that continued to accrue after the limitation period had expired. The court reasoned that it was “neither fair nor reasonable to require a suit within two years from the date of the loss, while imposing a condition precedent to the suit ... that cannot be met within that two-year period.”

Central to the court’s reasoning was that replacement cost coverage under the policy could not be determined unless and until the policyholder completed the repairs or rebuilding of the damaged property. This, the court found to be inherently in conflict with the policy’s requirement that any legal challenge to the replacement cost claim be brought within two years of the date of loss. As the court noted, nowhere did the policy account for instances, like the one facing Executive, where the damaged property *could not* be repaired, replaced or rebuilt within the two-year limitation period. The court concluded, therefore, that under those circumstances it would be unfair and unreasonable to apply the limitation period as a bar to a lawsuit on a claim that did not mature until after the limitation period had expired. As the court put it, the limitation provision as applied to Executive’s claim amounts to a “nullification of the claim [that] renders the coverage valueless when the repairs are time-consuming.”

#### IMPLICATIONS

*Executive Plaza* signifies what should be obvious — that facially reasonable conditions to coverage are nevertheless subject to challenge where they are applied to produce an unreasonable outcome. In the case of a suit limitation provision, as *Executive Plaza* illustrates, it is patently unreasonable for a carrier to apply a suit limitation provision to a loss that continues, per the terms of the policy, beyond the end of the limitation period.

The reasoning of *Executive Plaza* is not limited to instances of determining replacement cost value. The reasoning applies equally to any situation where a loss might not be complete until after a prescribed limitation period has expired. For instance, where a policy affords time element coverage, such as Extra Expense coverage, and the period of restoration exceeds the duration of the policy’s suit limitation provision, the reasoning of *Executive Plaza* should control. In that context, as in *Executive Plaza*, it would be unreasonable to require a policyholder to file suit against its carrier while its loss is still accruing.

**Contacts**

**Walter J. Andrews**  
wandrews@hunton.com

**Lon A. Berk**  
lberk@hunton.com

**Lawrence J. Bracken, II**  
lbracken@hunton.com

**John C. Eichman**  
jeichman@hunton.com

**Robert J. Morrow**  
rmorrow@hunton.com

**Syed S. Ahmad**  
sahmad@hunton.com

**Michael S. Levine**  
mlevine@hunton.com

**Sergio F. Oehninger**  
soehninger@hunton.com

**William T. Um**  
wum@hunton.com

**Christine Terrell**  
cterrell@hunton.com