

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: February 27, 2008 Decided: August 26, 2008)
5 Errata Filed: September 30, 2008)

6
7 Docket Nos. 06-4738-cv, 06-4741-cv

8 -----
9 FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC.,

10 Plaintiff-Appellee,

11 - v. -

12 JASAM REALTY CORP. and CROTONA PROPERTIES, INC.,

13 Defendants-Cross-Claimants-Appellants,

14 SURRE, GOLDBERG & HENRY ASSOCIATES, INC.,

15 Defendant-Cross-Defendant-Appellant,

16 JOSE RODRIGUEZ and ALICE RODRIGUEZ,

17 Defendants-Appellants.

18 -----
19 Before: CABRANES, POOLER, and SACK, Circuit Judges.

20 Appeal from a judgment of the United States District
21 Court for the Eastern District of New York (Leonard D. Wexler,
22 Judge), following a jury trial, declaring, inter alia: 1) that
23 plaintiff insurer has no duty to defend or indemnify the
24 defendant insureds in a personal injury lawsuit because the jury
25 found that the insureds had made material misrepresentations or
26 fraudulently concealed facts in connection with their requests

1 for insurance coverage; and 2) that defendant broker was not
2 liable to the insureds for failing to procure the insurance in
3 question. The district court also awarded costs to plaintiff
4 insurer. Because the district court's special verdict form
5 permitted the jury to consider incorrect dates on which the
6 veracity of the alleged misrepresentations could be judged and
7 the court did not correct the error when invited by the jury to
8 clarify the matter, the judgment is:

9 Vacated and remanded.

10 NORMAN KAPLAN, Great Neck, NY, for
11 Defendants-Cross-Claimants-Appellants.

12 HOWARD COHEN, Saretsky Katz Dranoff &
13 Glass LLP (Patrick J. Dellay, of
14 counsel), New York, NY, for
15 Defendant-Cross-Defendant-Appellant.

16 LORIN DONNELLY, Milber Makris Plousadis
17 & Seiden LLP, Woodbury, NY, for
18 Defendants-Appellants.

19 MEGAN VESELY, DLA Piper US LLP (Robin C.
20 Tarr, Joseph G. Finnerty, Jr., of
21 counsel), New York, NY, for Plaintiff-
22 Appellee.

23 SACK, Circuit Judge:

24 This is an appeal from a judgment of the United States
25 District Court for the Eastern District of New York (Leonard D.
26 Wexler, Judge), following a jury trial, declaring, among other
27 things, that plaintiff-appellee Fidelity and Guaranty Insurance
28 Underwriters, Inc., ("Fidelity") has no duty to defend or
29 indemnify defendants-appellants Jasam Realty Corp. ("Jasam") and
30 Crotona Properties Inc. ("Crotona") in connection with a personal

1 injury lawsuit that had been brought against Jasam and Crotona,
2 and awarding Fidelity its costs arising out of its provision of a
3 legal defense in that lawsuit. Defendant-appellant Surre,
4 Goldberg & Henry Associates, Inc. ("Surre") served as the
5 insurance broker in connection with the issuance of the policy in
6 question. The district court's judgment was based on the jury's
7 finding that both Jasam and Crotona had made material
8 misrepresentations or fraudulently concealed information in
9 connection with their requests for insurance coverage by
10 Fidelity. On appeal, the defendants argue that they are entitled
11 to judgment in their favor as a matter of law and, in the
12 alternative, that the district court erred in formulating its
13 special verdict form and committed various other errors in the
14 course of conducting the trial. We agree with the latter
15 argument, and therefore vacate the judgment and remand.

16 **BACKGROUND**

17 "When an appeal comes to us after a jury verdict, we
18 view the facts of the case in the light most favorable to the
19 prevailing party." Kosmynka v. Polaris Indus., Inc., 462 F.3d
20 74, 77 (2d Cir. 2006). We recite the facts underlying this
21 appeal in accordance with that principle.

22 On July 17, 1997, Fidelity issued a general commercial
23 liability insurance policy to Jasam. The policy was renewed
24 annually until Fidelity cancelled it on April 26, 2001. Jasam
25 had been incorporated some two weeks before the policy issued, on

1 July 2, 1997, for the purpose of purchasing and then operating a
2 shopping center.¹

3 On May 25, 1999, Jasam's principal, Jacob Rad,
4 incorporated Crotona as a vehicle for purchasing land in the
5 Bronx. Shortly thereafter, in June or July 1999, Crotona
6 purchased the land. At that time, the land was vacant.

7 On August 4, 1999, Rad sent a telecopy to Surre,
8 Jasam's insurance broker, requesting that properties owned by
9 Crotona be added to the coverage provided by Jasam's liability
10 policy. Surre then completed a "binder" form on its own
11 letterhead, dated August 5, 1999, that referenced the insurance
12 policy Jasam had held with Fidelity since 1997. It purported to
13 add to that policy the Crotona properties as well as the Crotona
14 entity itself as an additional named insured. It listed an
15 effective date of August 5, 1999, but no expiration date. It
16 stated:

17 The Company [Fidelity] accepting this risk
18 acknowledges itself bound by terms,
19 conditions and limitations of the
20 policy . . . of the insurance in current use
21 by the Company for the kind . . . of
22 insurance specifically ordered on this Binder
23 from the effective date and hour specified
24 therein Unless previously cancelled
25 as hereinafter provided, this Binder shall
26 terminate upon acceptance by the insured of a
27 policy . . . as ordered herein. This Binder
28 may be cancelled at any time by the Insured
29 or by the broker or agent who placed the risk

¹ Jasam initially procured this policy from Fidelity through KGK Agency Inc., an insurance broker. But in July 1998, Jasam requested that Fidelity recognize Surre rather than KGK as its broker of record with respect to the Fidelity insurance policies that it held.

1 by notice to the Company This Binder
2 may be cancelled by the Company by written
3 notice to the Insured and to the agent or
4 broker who placed the risk stating when, not
5 before 12:00 o'clock noon of the fifth
6 business day following the date of mailing,
7 such cancellation shall be effective. A
8 premium charge at the rates and in compliance
9 with the rules . . . in use by the Company
10 when this Binder becomes effective will be
11 made for the time this Binder is in effect if
12 no policy of insurance in place hereof is
13 issued and accepted by the Insured.

14 Binder, Plaintiff's Trial Exhibit 10, at 1.² Fidelity neither
15 disputes nor concedes the authenticity of this document or the
16 date, if any, on which it was delivered to Jasam.

17 The relationship between Fidelity and Surre was
18 established, in part, by an "Agency Agreement" to which both
19 companies were parties, a version of which was executed on April
20 27, 1998. Addenda to the agreement were executed at later dates,
21 all of which were prior to the date of the binder at issue in
22 this lawsuit. The Agency Agreement stated, among other things,
23 that Surre had the authority, on behalf of Fidelity and related
24 companies:

- 25 1. To accept applications for insurance; to
26 bind the Company on coverages; and to
27 issue, endorse, provide certificates of
28 insurance and cancel contracts of
29 insurance; all subject to the letter of
30 authority and subject to the
31 underwriting rules and requirements of
32 the Company[; and]
- 33 2. To pay claims within the specific
34 authority granted by the Company.

² References to "Exhibit" in this opinion refer to exhibits introduced as evidence during the district court's proceedings held May 30, 2006, through June 1, 2006.

1 Agency Agreement, Plaintiff's Trial Exhibit 21, at 1. The
2 boundaries of this authority were described in an attached
3 "General Letter of Authority," in which Fidelity granted Surre
4 "[a]uthority to bind coverage . . . on acceptable risks for
5 coverages filed and written by the company subject to
6 [Fidelity's] normal rules, guidelines and underwriting
7 standards," id. at 6, but, with respect to commercial liability
8 insurance of the sort held by Jasam, limited this authority to
9 incurring a maximum risk of \$1,000,000. Binders issued by Surre
10 were to conform to certain requirements:

11 Binders must refer to the standard applicable
12 coverage form being bound, the term of
13 binder, the limits of liability, the name and
14 address of insured, the property covered and
15 the location of risk. The binder must be
16 received by the company in writing within
17 three (3) working days of the inception date
18 of said coverage. No back dating of coverage
19 is allowed. Binders are not to exceed 30
20 days in length. If coverage is needed for a
21 longer period of time, the policy should be
22 issued.

23 Id. at 7.

24 The Agency Agreement also imposed a variety of related
25 responsibilities on Surre:

26 [Surre] agrees . . . to promptly report all
27 claims and deliver all relevant claims
28 information involving coverages placed with
29 the Company . . . ; to provide reliable
30 underwriting information; and to submit
31 written binders to the Company within three
32 working days of coverage inception.

33 Id. at 1.

1 The parties dispute when Surre notified Fidelity of the
2 binder it issued to Jasam for Crotona. Surre asserts that it did
3 so on August 5, 1999, immediately after receiving Jasam's
4 request, and that it did so again on December 14, 1999, and once
5 again on August 22, 2000. Fidelity maintains that it received no
6 notice of the binder nor any request for insurance related to
7 Crotona until the latter date, August 22, 2000.

8 In late 1999, several months after Crotona purchased
9 the properties in question, and after August 5, 1999, the date of
10 the "binder" form, Jasam began building residences on the Crotona
11 properties. On January 10, 2000, defendant Jose Rodriguez was
12 injured while working on the construction site. On July 5, 2000,
13 Rodriguez filed a lawsuit against Jasam related to this injury.
14 On August 15, 2000, Jasam notified Surre of Rodriguez's action.
15 Eight days later, on August 23, 2000, Surre forwarded Jasam's
16 claim to Fidelity, which Fidelity received.

17 Fidelity did not itself issue an endorsement³ for
18 Crotona or the Crotona properties until August 22, 2000, well
19 after Rodriguez was injured. At Surre's request, however,
20 Fidelity back-dated this coverage to August 5, 1999, the same day
21 that Surre stated that it received Jasam's request for insurance
22 for Crotona and the effective date shown on the Surre binder
23 form.

³ An "endorsement" is "[a]n amendment to an insurance policy; a rider." Black's Law Dictionary 569 (8th ed. 2004).

1 Some seven months later, in April 2001, Fidelity sent a
2 "Notice of Cancellation of Insurance," notifying Surre that it
3 was cancelling Jasam's general liability insurance policy based
4 on "MATERIAL MISREPRESENTATION OF EXPOSURES." Cancellation
5 Notice, Plaintiff's Trial Exhibit 38, at 2. Fidelity explained
6 that the policy covered only vacant land and not "construction
7 sites for building new dwellings." Id. at 1. The cancellation
8 was to be effective April 26, 2001.

9 District Court Proceedings

10 In December 2001, Fidelity filed a complaint in the
11 district court that, as amended in October 2002, sought: 1) a
12 declaration that it owed "no duty to defend or indemnify [Jasam
13 or Crotona] in the underlying action" brought by Rodriguez; 2) a
14 judgment rescinding Jasam's insurance policy; and 3) an award of
15 damages for the cost of defending Jasam and Crotona in the
16 underlying action. In the alternative, Fidelity sought
17 indemnification from Surre.

18 The district court conducted a jury trial that
19 concluded on June 2, 2006.⁴ The jury answered a special verdict
20 form provided by the court that included the following
21 interrogatories: 1) "Did Jasam make any material
22 misrepresentation in connection with the request for coverage of
23 the Crotona Properties?"; and 2) "Did Jasam engage in fraudulent

⁴ This case had previously been tried before a jury in 2003. On appeal, the district court's judgment following that trial was vacated based on ambiguity in the court's special verdict form. Fidelity and Guar. Ins. Underwriters, Inc. v. Rodriguez, 141 F. App'x 11 (2d Cir. 2005) (summary order).

1 concealment in connection with the request for coverage of the
2 Crotona Properties?" Analogous questions were also posed with
3 respect to Crotona.

4 While the jury was deliberating, it submitted a written
5 query to the district court: "Having problem with 1st question.
6 If we consider 8/5/99 as date to consider misrepresentation or
7 8/22/2000, answers to questions will possibly differ. Which date
8 should we consider when answering?" The district court
9 responded: "I will not help you much. Consider both dates.
10 Consider August 5, [19]99, consider [August] 22, 2000, consider
11 one date or both. It's up to you."

12 After completing its deliberations, the jury answered
13 "YES" to both the material misrepresentation and fraudulent
14 concealment questions, and as to both Jasam and Crotona. On the
15 special verdict form, the jury indicated that the following
16 statements were material misrepresentations: 1) "misstatement as
17 to the true nature of Jasam's business"; and 2) "misstatement as
18 to the use of the land to be insured." The jury also determined
19 that the information that had been fraudulently concealed by both
20 Jasam and Crotona included all of the options included in the
21 special verdict form: 1) "failure to advise of the true nature of
22 Jasam's [or Crotona's] business"; 2) "failure to advise that the
23 land to be insured was a construction site"; and 3) "failure to
24 advise Fidelity about the Rodrigue[z] lawsuit."

25 Separately, the jury indicated on the special verdict
26 form that: 1) "Surre breach[ed] its contract with Fidelity"; 2)

1 "Surre [was not] negligent in its dealings with Jasam with
2 respect to the Crotona properties"; and 3) "Surre [was not]
3 negligent in its dealings with Crotona with respect to the
4 Crotona properties."

5 Based on the jury's findings, the district court issued
6 a judgment declaring that Fidelity had properly cancelled the
7 insurance policies at issue, that Fidelity had no duty to defend
8 or indemnify Jasam or Crotona with respect to the Rodriguez
9 lawsuit, and that Jasam and Crotona were liable to Fidelity for
10 the stipulated costs it had already expended in the Rodriguez
11 litigation. The court also declared that Surre had no liability
12 to Jasam or Crotona for the resulting absence of insurance
13 coverage.

14 The defendants appeal.

15 **DISCUSSION**

16 I. Special Verdict Form

17 The defendants argue that the district court abused its
18 discretion by, among other things, failing to specify in its
19 special verdict form the correct date on which the veracity of
20 Jasam's statements was to be judged. We agree that the district
21 court erred in this regard and that we must therefore vacate the
22 judgment.

23 The formulation of special verdict questions
24 rests in the discretion of the trial judge,
25 and therefore our review is confined to
26 inquiring whether the trial court's
27 submission of the issues in the form of these
28 questions constituted an abuse of discretion.
29 We will reverse a judgment entered upon
30 answers to questions which mislead and

1 confuse the jury or which inaccurately frame
2 the issues to be resolved by the jury.

3 Cann v. Ford Motor Co., 658 F.2d 54, 58 (2d Cir. 1981) (citations
4 omitted), cert. denied, 456 U.S. 960 (1982). In other words,
5 "[a] new trial is warranted if, taken as a whole, the jury
6 instructions gave a misleading impression or inadequate
7 understanding of the law." BAll Banking Corp. v. UPG, Inc., 985
8 F.2d 685, 696 (2d Cir. 1993) (citation and internal quotation
9 marks omitted). We therefore begin our analysis with the law
10 relevant to Fidelity's claims of misrepresentation and fraudulent
11 concealment.

12 Under New York law,⁵ an insurer may rescind an
13 insurance policy if it was issued in reliance on material
14 misrepresentations. Republic Ins. Co. v. Masters, Mates & Pilots
15 Pension Plan, 77 F.3d 48, 52 (2d Cir. 1996); Process Plants Corp.
16 v. Beneficial Nat'l Life Ins. Co., 53 A.D.2d 214, 216, 385
17 N.Y.S.2d 308, 310 (1st Dep't 1976) (per curiam), aff'd on the
18 opinion below, 42 N.Y.2d 928, 366 N.E.2d 1361, 397 N.Y.S.2d 1007
19 (1977); see also N.Y. Ins. Law § 3105. A misrepresentation in an
20 application for insurance is defined as a false "statement as to
21 past or present fact, made to the insurer by, or by the authority
22 of, the applicant for insurance or the prospective insured, at or
23 before the making of the insurance contract as an inducement to
24 the making thereof." N.Y. Ins. Law § 3105(a). A policy may also
25 be rescinded by the insurer "if the insured fraudulently

⁵ The parties do not dispute that New York substantive law applies to the legal issues raised by this lawsuit.

1 concealed from or misrepresented a material fact to the insurer
2 at the time the policy was issued." City of Johnstown v. Bankers
3 Standard Ins. Co., 877 F.2d 1146, 1153 (2d Cir. 1989).

4 The special verdict form identified three facts alleged
5 by Fidelity to be material and to have been misrepresented or
6 fraudulently concealed by Jasam: 1) that the Crotona properties
7 were construction sites; 2) that Jasam was a general contractor;
8 and 3) that Rodriguez had filed a personal injury lawsuit against
9 Jasam and Crotona. There is little question that these
10 conditions or events had all existed or occurred by July 5, 2000,
11 when the last of the three became true: Rodriguez filed his
12 personal injury lawsuit. Representations to the contrary after
13 that date would have been false; failure to disclose those facts
14 could have provided the basis for rescission based on fraudulent
15 concealment. The parties do not agree, however, that any such
16 representations or concealments were made on or after July 5,
17 2000. And the district court declined to tell the jury, either
18 in its special verdict form interrogatories or after receiving a
19 written query from the jury, what date to consider for these
20 purposes.

21 To resolve this question, we look to New York Insurance
22 Law § 3105(a), which directs us to examine statements made "by,
23 or by the authority of, the applicant for insurance" and to do so
24 as of the point in time "at or before the making of the insurance
25 contract." Id. Fidelity argues that the date that must be used
26 is August 22, 2000, when, it asserts, it first received notice

1 from Surre of Jasam's request for insurance coverage for Crotona
2 and the Crotona properties, and when it issued in return the
3 endorsement for these additional risks. That is, in Fidelity's
4 view, Surre acted "by authority of" Jasam when it requested
5 insurance coverage on August 22, 2000. The insurance contract
6 was "made" on that date, irrespective of when Jasam may have
7 requested insurance from Surre, and irrespective of what Jasam
8 may have represented to Surre when it made that request.

9 Fidelity identifies no evidence that Jasam itself made
10 representations of any sort on August 22, 2000. Fidelity relies
11 entirely on statements made by Surre at the time and on (1) "the
12 general rule . . . that an insurance broker is regarded as agent
13 for the insured," Riedman Agency, Inc. v. Meaott Constr. Corp.,
14 90 A.D.2d 963, 964, 456 N.Y.S.2d 553, 555 (4th Dep't 1982),
15 appeal dismissed, 58 N.Y.2d 824, and (2) the well-established
16 principle that an agent's frauds or misrepresentations are
17 imputed to the principal if made within the scope of the agent's
18 authority, see, e.g., Dyke v. Peck, 279 A.D.2d 841, 843, 719
19 N.Y.S.2d 391, 394 (3d Dep't 2001); Adler v. Helman, 169 A.D.2d
20 925, 926, 564 N.Y.S.2d 828, 830 (3d Dep't 1991).

21 In light of the Agency Agreement between Fidelity and
22 Surre, however, Fidelity's reliance on these principles is
23 misplaced. "Although an insurance broker is generally considered
24 to be an agent of the insured, a broker will be held to have
25 acted as the insurer's agent where there is some evidence of
26 'action on the insurer's part, or facts from which a general

1 authority to represent the insurer may be inferred.'" Rendeiro
2 v. State-Wide Ins. Co., 8 A.D.3d 253, 253, 777 N.Y.S.2d 323, 324
3 (2d Dep't 2004) (quoting Bennion v. Allstate Ins. Co., 284 A.D.2d
4 924, 925, 727 N.Y.S.2d 222, 224 (4th Dep't 2001) (citations
5 omitted)). The Agency Agreement explicitly authorized Surre, as
6 Fidelity's agent, to "accept applications for insurance" and "to
7 bind [Fidelity] on coverages." Agency Agreement, Plaintiff's
8 Trial Exhibit 21, at 1. And the policy issued by Fidelity
9 provided that "written notice by or on behalf of any claimant to
10 any of our agents in New York State . . . will be the same as
11 notice to [Fidelity]." Fidelity Insurance Policy, Plaintiff's
12 Trial Exhibit 17, at 35. These clear delegations of authority
13 amply establish Surre's authority to represent Fidelity in these
14 specific roles. Aside from the common-law insured-broker
15 relationship, overridden in this respect by contract, Fidelity
16 has not identified any evidence that Surre did not possess this
17 explicitly delegated authority. See Warnock Capital Corp. v.
18 Hermitage Ins. Co., 21 A.D.3d 1091, 1094, 803 N.Y.S.2d 606, 609
19 (2d Dep't 2005) (concluding that insured is entitled to coverage
20 based on broker-issued binder "as a matter of law [in light of]
21 evidence indicating that [insurer] and [broker]'s course of
22 conduct demonstrated that [broker] maintained apparent authority
23 to issue a binder on behalf of [insurer]"). To the extent Surre
24 acted within the scope of this agency agreement, moreover,
25 Surre's knowledge of Jasam's business, properties, and claims
26 must be imputed to Fidelity, even if that knowledge was untimely

1 communicated by Surre to Fidelity. See, e.g., Seward Park Hous.
2 Corp. v. Cohen, 287 A.D.2d 157, 167, 734 N.Y.S.2d 42, 50-51 (1st
3 Dep't 2001) ("The general rule is that knowledge acquired by an
4 agent acting within the scope of his agency is imputed to his
5 principal and the latter is bound by such knowledge although the
6 information is never actually communicated to it." (quoting
7 Center v. Hampton Affiliates, 66 N.Y.2d 782, 784, 488 N.E.2d 828,
8 829, 497 N.Y.S.2d 898, 899 (1985) (internal quotation marks
9 omitted)).

10 Based on the scope of Surre's authority as Fidelity's
11 agent, the only representations relevant in these circumstances
12 are those that were made by Jasam to Surre in connection with the
13 binder for coverage for Crotona and the Crotona properties. The
14 accuracy of those representations must be evaluated at the time
15 when Surre, acting as Fidelity's agent for purposes of accepting
16 insurance applications and binding Fidelity to coverage, received
17 Jasam's request and thereafter bound Fidelity to the requested
18 coverage. Surre's knowledge of Jasam's business and claims at
19 that time is imputed to Fidelity. Any error or delay by Surre in
20 communicating this request to Fidelity as its principal is
21 irrelevant to our misrepresentation inquiry, even though it would
22 be relevant to Fidelity's claim that Surre breached the Agency
23 Agreement.⁶

⁶ We also note that with respect to Surre's authority to bind Fidelity to coverages, we would look to Surre's apparent authority and not "any secret limitations upon [its] actual authority which may have been imposed by [the insurer] in this particular instance." Cees Restaurant, Inc. v. Lobdell, 15

1 Because there is no evidence that Jasam itself made any
2 further representations on August 22, 2000, the jury should not
3 have been permitted to attribute Jasam's earlier representations
4 to that date. The district court's failure to specify the proper
5 date in its special verdict form, and its subsequent instruction
6 to the jury to consider Jasam's representations as of either
7 August 5, 1999, or August 22, 2000, gave a misleading impression
8 and inadequate understanding of the law and was therefore error.

9 We cannot ourselves determine, from the text of the
10 special verdict form or otherwise, whether the jury concluded
11 that Jasam had misrepresented or fraudulently concealed
12 information on August 22, 2000 -- a finding that would be
13 impermissible as a matter of law -- or on August 5, 1999. This
14 ambiguity requires that we vacate the judgment of the district
15 court in its entirety.⁷

16 II. Judgment as a Matter of Law

17 The defendants also ask us to enter judgment in their
18 favor as a matter of law, notwithstanding the jury's answers to
19 the interrogatories. For the following reasons, we decline to do
20 so.

21 A. Sufficiency of the Evidence

N.Y.2d 275, 281, 206 N.E.2d 180, 184, 258 N.Y.S.2d 87, 91 (1965).

⁷ The defendants raise several other arguments related to the jury instructions, the exclusion of certain testimony, and limitations placed on the participation of Rodriguez's counsel at trial. We need not evaluate these arguments to resolve this appeal and express no view as to their merits.

1 The defendants assert that even if the jury made (or
2 another jury were to make) a finding of material
3 misrepresentation while correctly treating August 5, 1999, as the
4 date as of which to assess Jasam's communications, they would
5 nonetheless be entitled to judgment as a matter of law. A jury
6 verdict may be set aside as a matter of law when "a party has
7 been fully heard on an issue during a jury trial and the court
8 finds that a reasonable jury would not have a legally sufficient
9 evidentiary basis to find for the party on that issue." Fed. R.
10 Civ. P. 50(a)(1). This requires "such a complete absence of
11 evidence supporting the verdict that the jury's findings could
12 only have been the result of sheer surmise and conjecture,
13 or . . . such an overwhelming amount of evidence in favor of the
14 movant that reasonable and fair minded men could not arrive at a
15 verdict against him." Song v. Ives Labs., Inc., 957 F.2d 1041,
16 1046 (2d Cir. 1992) (quoting Mattivi v. S. African Marine Corp.,
17 618 F.2d 163, 168 (2d Cir. 1980)) (internal quotation marks
18 omitted; ellipsis in original).

19 The defendants are correct that some of the jury's
20 findings could not stand -- Jasam could not, for example, have
21 fraudulently concealed the Rodriguez lawsuit, which together with
22 his injuries did not occur until 2000. But the jury could
23 reasonably have concluded that Jasam misrepresented other facts
24 in August 1999.

25 Fidelity alleges, for example, that Jasam
26 misrepresented its intended use of the Crotona properties to

1 Surre when it requested additional coverage. The defendants
2 counter that there was no evidence that in August 1999 the
3 Crotona properties were not vacant or that they harbored any
4 intention at the time to perform construction on the site. But
5 construction on the property began, in fact, shortly thereafter.
6 And Jacob Rad, Jasam's principal, concedes that he knew what kind
7 of insurance coverage was required for this construction. There
8 is little indication that he sought the appropriate coverage when
9 the nature of the property changed to a construction site. We
10 therefore think that there remains a question as to whether Jasam
11 made material misrepresentations of fact (or fraudulently
12 concealed facts) in connection with its request for insurance for
13 Crotona in August 1999. Judgment as a matter of law is not
14 appropriate on this ground.

15 B. Questions of Law

16 The defendants argue that even if we were to accept the
17 jury's finding that Jasam and Crotona had made material
18 misrepresentations in August 1999, they are, for various reasons,
19 nonetheless entitled to judgment as a matter of law in light of
20 other undisputed facts.

21 1. 1997 Application. Jasam first contends that
22 because it is undisputed that no misrepresentations were made in
23 its initial application for insurance in 1997, neither that
24 policy, nor any renewals of that policy, nor any additional
25 endorsements to that policy, are subject to rescission. Under
26 this view, an insurance policy along with renewal of, and

1 endorsements to, that policy exist as a monolithic contract that
2 may be rescinded based only on initial misrepresentations and
3 only as a whole.

4 Jasam relies for this proposition on the general
5 principle that insurance policy renewals are considered
6 extensions of the initial policy -- and therefore not new
7 contracts -- if there is a provision in the insurance policy
8 requiring renewal, for which it cites 68A N.Y. Jur. 2d Insurance
9 § 850. Because a misrepresentation under N.Y. Ins. Law § 3105 is
10 to be evaluated "at or before the making of the insurance
11 contract," or so the argument goes, the absence of a new contract
12 would negate the possibility of misrepresentation under the
13 statute.

14 Regardless of the merits of this argument, it has no
15 bearing on the rescission of the renewals or endorsements of the
16 particular insurance policy at issue in this case. New York law
17 is clear that where an insurer has the absolute right to
18 terminate a policy on its anniversary, each renewal does indeed
19 represent a new policy. See Moore v. Metro. Life Ins. Co., 33
20 N.Y.2d 304, 312, 307 N.E.2d 554, 557, 352 N.Y.S.2d 433, 438
21 (1973). Although the Fidelity insurance policy at issue limits
22 the insurer's ability to cancel the policy while it is in effect,
23 it places no limit beyond a sixty-day notice period on Fidelity's
24 right not to renew. Because Fidelity retained this right, each
25 policy must be considered separately, and any misrepresentations

1 made in the course of obtaining a renewal of the policy may be
2 grounds for rescission.

3 Similarly, Fidelity was under no obligation to issue
4 the requested endorsement to cover Crotona and the Crotona
5 properties. Once an endorsement is issued -- whether by Fidelity
6 itself or through an authorized agent such as Surre -- that
7 endorsement is considered together with the policy proper and the
8 application as a single instrument. See Massachusetts Mut. Life
9 Ins. Co. v. Lord, 18 A.D.2d 69, 71, 238 N.Y.S.2d 222, 224 (1st
10 Dep't), aff'd without opinion, 13 N.Y.2d 1096, 196 N.E.2d 266,
11 246 N.Y.S.2d 630 (1963) (citing Berkshire Life Ins. Co. v.
12 Weinig, 290 N.Y. 6, 10, 47 N.E.2d 418, 421 (1943)). As with a
13 discretionary renewal, Fidelity's acceptance (by Surre) of
14 Jasam's request for coverage of the Crotona properties created a
15 new insurance contract, and any misrepresentations made to induce
16 the making of that contract may provide grounds for rescission.⁸

17 Jasam's presumably truthful statements in its initial
18 application for insurance in 1997 therefore do not entitle it to
19 judgment as a matter of law.

⁸ Such a misrepresentation must, of course, be material. We have observed that under New York law, "nondisclosure of a fact concerning which the applicant has not been asked does not ordinarily void an insurance policy absent an intent to defraud," and "an applicant is ordinarily permitted to remain silent on matters concerning which he is not questioned. His insurance policy may be voided for concealment only when he conceals matters material to the risk and he does so in bad faith with intent to deceive the insurer." First Fin. Ins. Co. v. Allstate Interior Demolition Corp., 193 F.3d 109, 117-18 (2d Cir. 1999) (citations, internal quotation marks, and alteration omitted).

1 2. Waiver. Jasam also argues that Fidelity waived its
2 right to rescind the insurance policy based on material
3 misrepresentations, both by contract and by cancelling the policy
4 pursuant to the policy's terms without any reservation of its
5 right of rescission. Although these arguments may have merit, we
6 decline to resolve them at this time.

7 Jasam correctly observes that its insurance policy
8 explicitly addressed the possibility that the insured might use
9 "fraud or material misrepresentation in the obtaining of the
10 policy or in the presentation of a claim." Where Fidelity
11 discovers such a fraud or misrepresentation, the policy permits
12 it to cancel the policy provided it mails "written notice at
13 least 15 days before the effective date of cancellation." When
14 Fidelity discovered that Jasam had begun construction on the
15 Crotona properties, it complied with this provision by notifying
16 Jasam on April 11, 2001, that the policy would be cancelled
17 effective April 26, 2001, for "MATERIAL MISREPRESENTATION OF
18 EXPOSURES." Cancellation Notice, Plaintiff's Trial Exhibit 38,
19 at 2. It is not clear, however, whether under New York law the
20 insurance policy's provision or the cancellation notice prevents
21 Fidelity from seeking to rescind the same policy.

22 We are aware of only one decision addressing the issue
23 of rescission following cancellation under New York law. In
24 Stein v. Security Mut. Ins. Co., 38 A.D.3d 977, 832 N.Y.S.2d 679
25 (3d Dep't 2007), the Supreme Court, Appellate Division, concluded
26 that even where a defendant insurer "could have rescinded

1 [insured's] policy, rendering it void ab initio," based on
2 material misrepresentations in the application for insurance, it
3 was not free to do so once the insurer "elected to cancel [the]
4 policy rather than rescind it." Id. at 978-79, 832 N.Y.S.2d at
5 681; see also 2004 Ops. N.Y. Ins. Gen. Counsel, Aug. 18, 2004,
6 No. 6 (observing that neither the legislature nor the courts had
7 determined whether an insurer's election of a cancellation remedy
8 for misrepresentation precludes later rescission).

9 Similarly, it does not appear that any court has
10 directly addressed the question whether, under New York law, an
11 insurer waives its common-law right to rescind an insurance
12 policy by limiting the conditions under which it would cancel the
13 policy. The Appellate Division in Stein appears to have assumed
14 that the insurer's statutory obligation to cancel a policy only
15 with sufficient prospective notice in that case, see N.Y. Ins.
16 Law § 3425, did not alone preclude a rescission remedy. The
17 insurer was, however, required to elect one of these remedies.

18 We think it unwise to grant judgment as a matter of law
19 to a party where, as here, the law is unclear and the issue may
20 ultimately become moot after remand. The resolution of these
21 questions of law may, moreover, have significant consequences for
22 insurers that have selected New York law to govern their
23 policies.

24 "Where unsettled and significant questions of state law
25 will control the outcome of a case, we may certify those
26 questions to the New York Court of Appeals." Colavito v. N.Y.

1 Organ Donor Network, Inc., 438 F.3d 214, 229 (2d Cir. 2006)
2 (citations and internal quotation marks omitted). Any
3 certification in this case would, however, be premature. "In
4 deciding whether to certify a question we consider: (1) the
5 absence of authoritative state court decisions; (2) the
6 importance of the issue to the state; and (3) the capacity of
7 certification to resolve the litigation." O'Mara v. Town of
8 Wappinger, 485 F.3d 693, 698 (2d Cir. 2007). Although the first
9 two prongs of this test may very well be satisfied here, the
10 errors in the district court's jury interrogatories could prevent
11 resolution of this case even if we certified the question. If
12 the New York Court of Appeals were to conclude that rescission
13 was available to Fidelity, despite its cancellation of the policy
14 in April 2001, we nonetheless would be required to remand. The
15 outcome of this appeal does not turn on the issue. By remanding
16 to the district court, as we do, these unsettled legal questions
17 may be rendered moot if, for example, a jury returns a verdict
18 favorable to the defendants.

19 For these reasons, we decline either to resolve, for
20 purposes of this appeal, the merits of these arguments or to
21 certify them to the New York Court of Appeals.

22 3. Estoppel. The defendants contend that the remedy
23 of rescission is no longer available to Fidelity because it has
24 retained all insurance premiums paid by Jasam and continued to
25 accept premiums well after it could have rescinded the policy.
26 "It is well settled that the continued acceptance of premiums by

1 the carrier after learning of facts which allow for rescission of
2 the policy, constitutes a waiver of, or more properly an estoppel
3 against, the right to rescind," Scalia v. Equitable Life
4 Assurance Soc'y, 251 A.D.2d 315, 315, 673 N.Y.S.2d 730, 731 (2d
5 Dep't 1998) (citing Bible v. John Hancock Mut. Life Ins. Co., 256
6 N.Y. 458, 462, 176 N.E. 838, 840 (1931)). The facts underlying
7 this issue, however, were not developed at trial. The defendants
8 point to no evidence in the record, for example, that indicates
9 when Fidelity learned of facts which would have allowed for
10 rescission of the policy. Were such evidence presented,
11 moreover, there is no indication that Fidelity was provided the
12 opportunity to explain to the jury any delay in exercising a
13 right of rescission. It is not even clear on the current record
14 how long this delay was alleged to have been.

15 Because we would remand for retrial in any event, we
16 also decline to resolve the merits of this argument. See LNC
17 Investments, Inc. v. First Fidelity Bank, 173 F.3d 454, 468-69
18 (2d Cir. 1999).⁹

19 CONCLUSION

20 For the foregoing reasons, we vacate the judgment and
21 remand the case to the district court. The district court's
22 judgment with respect to Surre is also vacated because it is

⁹ We reiterate our prior instruction that if the parties "want to have their contentions addressed upon the retrial, and any appeal therefrom, they have a responsibility to put forth the evidence upon which their contentions depend." Fidelity, 141 F. App'x at 13 n.1.

1 dependent on the judgment with respect to the remaining
2 defendants.