

THE POLICYHOLDER ADVOCATE/IP COUNSELOR

NEWSLETTER

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PURSUIT OF INSURANCE BROKERAGE “BID-RIGGING”/ “CONTINGENT COMMISSION” OVERCHARGES

I. RECENT LITIGATION AGAINST AGENTS, BROKERS AND INSURERS

A. New York State Class Action Suit Against Marsh by New York Attorney General Spitzer (Commercial Lines)

Eliot Spitzer filed a complaint against Marsh & McLennan & Co., filed October 14, 2004 in the Supreme Court of the State of New York, County of New York, is based on Articles 22 and 23 of the General Business Law, § 13(12) of the Executive Law, and the common law of the State of New York. Key fact allegations include contentions that:

- (1) Marsh falsely tells its clients that it is their “advocate” and that its “guiding principle” is “our client’s best interest”;
- (2) Marsh’s “disclosure” of its contingent commission agreement is false and misleading;
- (3) Marsh’s business plan has been to increase its contingent commission income by steering clients to favored insurance companies;
- (4) Numerous large insurance companies have participated in the bid-rigging scheme with Marsh.

Actionable conduct alleged includes:

- (a) Limiting the number of insurers competing to sell insurance to persons seeking such insurance;
- (b) Allocating the market for the sale of insurance; and
- (c) Using inflated bids, prices and other terms of sale with respect to insurance to mask the absence of free and open competition by insurers for the sale of such insurance.

B. Pennsylvania Class Action Suit Against Marsh (Commercial Lines)

A recent pleading in the United States District Court for the Eastern District of Pennsylvania, *Bayou Steel Corp. v. ACE INA Holdings, ACE USA, ACE Ltd., Marsh & McLennan Cos., Inc., Marsh, Inc., American International Group, Inc., The Hartford Financial Services Group, Inc., Aon Corp. and Aon Services Group*, alleges causes of action for antitrust law violations, Racketeering Influence and Corrupt Organizations Act liability, and damages and other relief under common law.

The wrongful acts of the defendant co-conspirators, beginning in and around 2001, to at least the summer of 2004, principally implemented by Marsh Global Broking’s Excess Casualty Group and AIG’s American Home Excess Casualty Division, as well as the other named defendants, include:



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- (a) Rigging bids and allocating clients with respect to the sale of insurance sold in the United States;
- (b) Creating the “ABC” quote system to facilitate and implement their bid rigging scheme;
- (c) Boycotting clients with respect to the sale of insurance sold in the United States; and
- (d) Paying contingent commissions to the Marsh defendants.

The effects of this alleged conspiracy include the following:

- (a) The plaintiff and the other members of the class had to pay more for insurance than they would have paid in a competitive marketplace, unfettered by defendants’ and co-conspirators’ collusive and unlawful activities;
- (b) Price competition in the sale of insurance was restrained, suppressed and eliminated in the United States; and
- (c) As a direct and proximate result of the illegal combination, contract or conspiracy, plaintiff and the members of the class have been injured and financially damaged in their respective businesses and property, in amounts that are presently undetermined.

C. Illinois Class Action Suit Against Aon (Commercial Lines)

Aon, Marsh, and various insurers are also subject to class action complaints for violation of the federal securities laws pending before the United States District Court for the District of Illinois, Eastern Division, No. 04C6962, docketed October 29, 2004, Judge Joan H. Lefkow, for alleged violation of Section 10(b) of the Exchange Act and Rule 10(b)(5) § 20(a) of the Exchange Act. The claimant is Lewis Wolintz.

II. LEGAL OBLIGATIONS OF AGENTS AND BROKERS

A. Obligations of the Broker

One who holds himself out to the public as an insurance broker must have the skill and knowledge requisite to the calling. Brokers typically do not have a fiduciary duty to their insureds. Thus, the negligence of a broker may not be limited to the tort statute of limitations, but rather to the limitations applicable to contracts, which are generally longer. New York has gone so far as to treat insurance brokers as mere order-takers or sellers of an ordinary product. *Murphy v. Kuhn*, 682 N.E.2d 972, 974 (N.Y. 1997) (“Generally, the law is reasonably settled on initial principles that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so . . .”).

An insured’s failure to read an inadequate policy may bar recovery for malpractice against the broker. *Busker on the Roof Ltd. P’ship v. Warrington*, 283 A.D.2d 376, 377 (N.Y. App. Div. 2001) (“Plaintiff received the subject policy months before the accident at issue, and is conclusively presumed to have known, understood and assented to its terms, and, accordingly, has no action against its insurance broker for having procured such coverage, even though the coverage was not entirely in accord with what plaintiff had requested.” (citation omitted)).

A broker acting as a claims manager must know to send a claim to the right insurer during the correct policy period. Many brokers tend to overlook the legal implications that their claims handling activities may have. For example, brokers routinely establish a “date of loss” based on a cursory review of the initial package of papers that the policyholder sends. Because of the strict reporting requirements contained in many claims-made policies, the date of loss assigned by the broker may turn into a fatal “admission” regarding when the policyholder received first notice of the claim. The broker may also provide any and all documents the policyholder has concerning the claim, without considering whether any of those documents are subject to privilege vis-à-vis the insurance company and/or the underlying claimant.

B. Obligations of the Agent

Many brokers are also agents of particular insurers and have agency agreements with them. As such, when they procure insurance through such an insurer, they may have additional and distinct duties beyond those they possess as brokers. Nevertheless, courts limit the duties of agents. In Wisconsin, an agent was not liable for obtaining incorrect coverage for the insured where the insured failed to reveal sufficient or significant information about the risk. *Kamikawa v. Keskinen*, 172 N.W.2d 24 (Wis. 1969). A Missouri court ruled that an agent had no duty to advise a client regarding sufficient amounts of coverage for his needs. *Manzella v. Gilbert-Magill Co.*, 965 S.W.2d 221 (Mo. Ct. App. 1998). An Ohio court ruled that an insurance agent was not liable for negligence in failing to advise a client of the need for a certain type of insurance, as the client had not requested advice. *Island House Inn v. State Auto. Ins. Co.*, 782 N.E.2d 156 (Ohio Ct. App. 2002), based upon *Fry v. Walters & Peck Agency*, 750 N.E.2d 1194 (Ohio Ct. App. 2001). An Illinois court found a captive agent owed no duty to defend, even when the client had requested “adequate” coverage. *Moore v. Johnson County Farm Bureau*, 798 N.E.2d 790 (Ill. App. Ct. 2003).

III. OTHER CONSIDERATIONS

There are two other areas where corporations may have left significant monies on the table.

First, brokers often fail to compare the relative strengths and weaknesses of particular general liability coverage sold in CGL policies as it relates to business liability risks. See *Broker Exposure to Intellectual Property and Antitrust Lawsuits* by David A. Gauntlett, CGL Reporter Spring 2002, (14) pp. 1400-1-1400-8.

Second, brokers may advise insureds not to tender business claims to insurers, warning of higher future premiums or stating that coverage does not exist. Failing to provide notice of claims to insurers because of these uncertainties is problematic because:

- (1) Cash flow from defense fee reimbursement in intellectual property cases can be significant;
- (2) Neither brokers nor risk managers may have evaluated the correct insurance program at issue since it is often difficult to determine which policy may provide coverage and when the first alleged wrongful conduct occurred which might trigger liability;
- (3) Anecdotal evidence reveals that premium adjustments rarely occur in connection with claims activity in intellectual property claims, and business exposure is only one of the liability risks to be assessed upon renewal; and
- (4) Brokers, it is suggested by Eliot Spitzer, often have a conflict of interest because their "contingent commissions" may depend upon the profitability of a client's business to the insurer; the broker may get more money if you do not file a claim.

IV. REMEDIES

Should you wish to pursue a claim for "bid rigging" or "contingent commission" charges, the following steps are recommended:

Develop proof of "bid-rigging" losses to the company by establishing:

- (1) What lower premiums would have been available from other insurers;
- (2) Whether broader policy language, not referenced by the broker or losing contender, would have permitted recovery beyond that available through the issued policy where a "claims-made" or "occurrence."

Develop losses due to contingent fee commissions:

- (1) Which brokers charged them without full and fair disclosure?
- (2) How long has this practice been ongoing?

Establish concessions made by insurers/brokers to regulators, and use evidence to demand disgorgement of "ill-gotten gains" under your state's statutory provisions. Marsh has acknowledged its willingness to make insureds whole who have sustained provable damages from "bid rigging." It claims no losses resulted from "contingent commissions" even if not fully disclosed. But it is possible that narrower coverage was proffered because it carried a higher contingent commission from the insurer and coverage distinctions between competing products were not explained to the insured. Remedies may include RICO liability with treble damages and attorney fee awards where proof of the requisite elements is met for assertion of such claims.

PUBLICATIONS BY DAVID A. GAUNTLETT

David A. Gauntlett is the author of *Insurance Coverage of Intellectual Property Assets* published by Aspen Law & Business. The book and supplements are available for \$160.00 plus tax where applicable; shipping and handling are free when full payment is enclosed with the order. To order, call Aspen Law & Business at 1-800-638-8437.

UPCOMING SEMINARS ON INSURANCE COVERAGE AND INTELLECTUAL PROPERTY WHERE DAVID A. GAUNTLETT IS SPEAKING OR ATTENDING

- Jan. 22-26, 2005 – IPL MIDWINTER MEETING - Trump Int'l Sonesta Beach Resort, Miami, FL.
- February 17-19, 2005 – TIPS INSURANCE COVERAGE LITIGATION 2005 MIDYEAR MEETING - Phoenix, AZ. David A. Gauntlett is scheduled to host a luncheon toolbox discussion on insurance coverage.

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- *March 3-6, 2005* – ABA INSURANCE COVERAGE LITIGATION SEMINAR - Tucson, AZ. David A. Gauntlett is scheduled to participate in a panel as a speaker.
- *March 22, 2005* – BUSINESS TORTS IN CALIFORNIA SEMINAR (Lorman Education Services) - Los Angeles, CA. David A. Gauntlett is a featured speaker.
- *April 14-16, 2005* – 20TH ANNUAL IPL CONFERENCE - Crystal Gateway Marriott Hotel, Arlington, VA. David A. Gauntlett is a featured speaker.
- *May 12-13, 2005* – SPRING 2005 INTERNATIONAL ANTI-COUNTERFEITING CONFERENCE - San Diego, CA. David A. Gauntlett is a featured speaker.
- *June 22-24, 2005* – 2005 SUMMER IPL CONFERENCE - San Francisco, CA. David A. Gauntlett attending.

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NEWSLETTER FACTS

The Policyholder Advocate/IP Counselor is published quarterly to inform clients, friends and other professionals of developments in insurance coverage and IP law. This newsletter is available free of charge to interested parties.

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GAUNTLETT & ASSOCIATES – THE POLICYHOLDER ADVOCATE

Gauntlett & Associates specializes in policyholder insurance coverage and litigation re copyright, antitrust, patent, trademark, trade secret, business and general coverage disputes.

Specific services offered include:

1. *Insurance coverage litigation focusing on IP and Antitrust Claims*
2. *IP litigation*
3. *Expert witness on insurance coverage issues, including fee disputes*
4. *Counsel to IP case-in-chief counsel for insurance coverage, including:*
 - *Choice of forum, and*
 - *Negotiation*
5. *Consultant to corporations regarding what type of policies to purchase to protect against IP litigation*
6. *Representation in arbitrations and mediations*
7. *Legal malpractice defense – as expert and percipient witness*

If you have a topic you would like to see addressed in future issues, please feel free to contact us with your suggestions.

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