

ALLEGED COLLUSION BETWEEN INSURANCE CARRIERS AND BROKERS MAY GIVE RISE TO CLAIMS BY POLICYHOLDERS

Recently, the news has been full of stories related to price fixing and improper kickbacks between insurance companies and insurance brokers. In October, the New York Attorney General, Elliott Spitzer, brought suit against the world's largest insurance broker, Marsh & McLennan. The suit alleges that Marsh cheated its customers by rigging prices and steering business to insurance companies in exchange for millions of dollars in kickbacks. The conduct at issue in New York, however, may be just one aspect of a much larger pattern of collusion between insurance companies and insurance brokers that has resulted in increased costs and damages to policyholders nationwide – including policyholders in Texas.

The role of insurance brokers like Marsh is to obtain for their clients the best possible insurance at the best possible price. In exchange for arranging coverage, the broker receives a fee or commission. Brokers are supposed to act in the best interests of their clients and to deal with insurance companies at arms length. Years ago, however, brokers began collecting additional fees from insurance companies for steering business to them. According to the Spitzer lawsuit, Marsh received approximately \$800 million in such fees in 2003 alone. In addition, the lawsuit alleges that Marsh solicited fake bids from insurance companies to make the client believe it was getting a competitive deal when, in fact, Marsh had already chosen where to place the insurance.

The fallout from the Spitzer lawsuit has already been significant. Marsh's CEO, Jeffrey Greenberg, resigned his position. In addition, two executives at AIG, one of the world's largest insurance companies, pleaded guilty to criminal charges for helping Marsh rig bids. There will no doubt be many more criminal and civil cases as the investigation broadens to other areas and other brokers, such as AON, who also received commissions/payments from insurance companies. And there is no reason to believe that the improper conduct between insurance companies and brokers is limited to New York.

A lawsuit filed by Haynes and Boone (Werner Powers) on behalf of policyholders last year in Texas alleged that AIG affiliated insurance companies (Lexington, Landmark and AISLIC) have for years engaged in a practice of placing surplus lines insurance in Texas in violation of the Texas Surplus Lines Statute. Texas requires insurance carriers who wish to sell insurance within Texas to become "admitted" and subject themselves to regulation by the State. However, "unadmitted" carriers are permitted to sell surplus lines insurance in Texas under certain circumstances. Surplus lines insurance is intended to fill the coverage gap where admitted carriers are unwilling or unable to issue insurance. Surplus lines insurance may only be procured by a licensed surplus lines agent and, significantly, the insurance cannot be available from admitted insurance carriers. In this regard, the surplus lines agent must use reasonable diligence to obtain insurance through admitted markets before placing it with a surplus lines carrier. This is because surplus lines insurance is often more expensive and exposes policyholders to much greater risks.

In general, the Texas lawsuit alleged that AIG created a “sham” surplus lines agent (Southern Risk Specialists) that placed surplus lines insurance with AIG affiliated carriers without first attempting to place the insurance in admitted markets. Over the past few years, Haynes and Boone has amassed substantial evidence of improper and unlawful conduct by carriers and brokers in the placement of surplus lines insurance in Texas. For example, there is evidence that insurance carriers made payments to brokers in exchange for the brokers placing surplus lines insurance with those carriers without first attempting to place the insurance in admitted markets.

The consequences to the insurance carriers and brokers who have engaged in such conduct are significant, and the resulting damages available to policyholders may be enormous. When a carrier issues a surplus lines policy that does not comply fully with the provisions of the Texas statute, the insurance is “unauthorized.” This means, among other things, that: (1) the carrier may not be able to enforce the terms and conditions of the policy; and (2) any person, such as an agent or broker, who participates in the sale of the unauthorized insurance may be liable for payment of policy benefits in the event a claim goes unpaid by the carrier. In addition, such persons may also be liable for taxes and stamping fees paid by the policyholder on any such “unauthorized” insurance. Additional damages may arise from inadequacies or problems in the policies obtained by the broker while operating under a conflict of interest.

Any company who believes it may have been the victim of improper or unlawful actions by its insurance carrier or insurance broker in the placement of insurance may wish to consult with counsel to determine what, if any, legal remedies may be available to them. As always, Haynes and Boone stands ready to assist in any way possible.

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