In the Missouri Court of Appeals
Eastern District

DIVISION FIVE

EMERSON ELECTRIC CO.,	)	No. ED95942
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	Case No. 22054-00569
	)	
MARSH & McLENNAN COMPANIES, et al.,	)	Honorable Robert H. Dierker, Jr.
	)	
	)	
Respondents.	)	Filed: September 6, 2011

Introduction

Appellant Emerson Electric Co. (Emerson) appeals the trial court's judgment granting Respondent Marsh & McLennan Companies' (Marsh) motion for judgment on the pleadings. We would affirm in part, reverse in part and remand. Because we also conclude this case concerns a matter of general interest and a question of importance, we transfer to the Missouri Supreme Court pursuant to Rule 83.02.[1]

[1] All rule references are to Mo. R. Civ. P. 2011, unless otherwise indicated.

Background

Emerson initiated this action against Marsh in 2005. Emerson's petition contains ten paragraphs of factual allegations. The first six relate to location and venue. The four remaining paragraphs set forth the relevant facts related to Emerson's claims:

> 7. Marsh is the largest provider of insurance brokerage services in the world. It holds itself out to its clients as a fiduciary that will act solely on their behalf in purchasing insurance policies for [its] clients.
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> 8. Commencing in 1987 or earlier, plaintiff hired Marsh to act as plaintiff's fiduciary in procuring various insurance policies such as Excess Liability, Aircraft, International and others. For those services, plaintiff paid substantial amounts to defendants to recommend insurance policies that met the plaintiff's needs at the lowest possible price.
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> 9. Unbeknownst to plaintiff, Marsh embarked on a business plan commencing in the early 1990's in violation of its fiduciary duties to plaintiff by entering into agreements with insurance companies under which the insurers agree[d] to pay Marsh monies in consideration of Marsh's pledge to direct business to them. These agreements were referred to by various names[,] e.g.[,] placement service agreements or market service agreements. For the purpose of this petition they will be referred to as "kickbacks."[2] At no time did defendants disclose the nature or extent of kickbacks defendants were receiving from insurers with whom they were placing plaintiff's insurance. As a result of defendant's breach of their fiduciary duties, plaintiff paid an inflated price for its insurance policies.
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> 10. Additionally, defendants directed plaintiff to make its premium payments through Marsh rather than directly to the insurance companies. The checks were made payable to Marsh. Unbeknownst to plaintiff, defendants did not immediately forward the premium payments to insurers, but instead for a period of time before [] the insur[ance] companies would be paid, Marsh would invest plaintiff's premium payments to earn interest which it retained as profit. In defendants' 2003 Annual Report, it referred to this revenue item as "fiduciary interest income."

[2] The "kickbacks" Emerson refers to are commonly known in the insurance industry as contingent commissions.

These four paragraphs are incorporated into the counts of Emerson's petition: unjust enrichment, civil conspiracy, and breach of fiduciary duty.[3]

Marsh moved for judgment on the pleadings for failure to state a claim upon which relief can be granted. The trial court found that the parties lacked a fiduciary relationship beyond Marsh's responsibility to procure a policy in accordance with Emerson's wishes, thus none of Emerson's claims could survive. The trial court granted Marsh's motion for judgment on the pleadings.

This appeal follows.

Standard of Review

A motion for judgment on the pleadings, pursuant to Rule 55.27, tests the sufficiency of the plaintiff's petition as a matter of law. Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596, 599 (Mo. banc 2007). "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." Id. Granting the non-movant the benefit of the well-pleaded facts, along with all reasonable inferences therefrom, we affirm a judgment on the pleadings only if it is clear the petitioner "could not prevail under any legal theory." In re Marriage of Busch, 310 S.W.3d 253, 260 (Mo. App. E.D. 2010). In contrast, we reverse if the pleadings present an issue of material fact, or if the well-pleaded facts of the petition, taken as true, show that the petitioner "could prevail under some legal theory." Id.

[3] Emerson's petition contains four counts, labeled Disgorgement-Restitution, Civil Conspiracy, Breach of Fiduciary Duty, and Punitive Damages. The trial court correctly identified disgorgement-restitution as a remedy to a claim of unjust enrichment, and thus considered Count I a claim of unjust enrichment. As to Count IV for punitive damages, the trial court found that this claim was incidental to the other causes of action and consequently fell with the first three counts.

Discussion

Marsh raises three points on appeal. Points I and II relate to Emerson's claim that Marsh breached its fiduciary duty to Emerson through Marsh's receipt of undisclosed contingent commissions. Point III argues Marsh breached its fiduciary duty to Emerson by retaining interest earned from the investment of Emerson's premium payments. As all points require an analysis of the relationship between the parties, including any corresponding duties present, we begin there.

Fiduciary Duty

In Missouri, it is established principle that "[w]hen an insurance broker agrees to obtain insurance for a client, with a view to earning a commission, the broker becomes the client's agent and owes a duty to the client to act with reasonable care, skill, and diligence." A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386, 394-95 (Mo. App. E.D. 1998) (citing Bell v. O'Leary, 733 F.2d 1370, 1372 (8th Cir. (Mo.) 1984); Barnes v. Metro. Life Ins. Co., 612 S.W.2d 786, 787 (Mo. App. E.D. 1981)). "Once an agency relationship has been established, a fiduciary relationship arises as a matter of law." A.G. Edwards, 978 S.W.2d at 395. It is also clear that the scope of this fiduciary duty of care, skill, and diligence is limited and ends upon procurement of the requested insurance. Hecker v. Mo. Prop. Ins. Placement Facility, 891 S.W.2d 813, 816 (Mo. banc 1995).

This is because an insurance broker can also act at times as the agent for the insurer; for example, in collecting and remitting premiums. Electro Battery Mfg. Co. v. Commercial Union Ins. Co., 762 F. Supp. 844, 848 (E.D. Mo. 1991) (citing Schimmel Fur Co. v. Am. Indem. Co., 440 S.W.2d 932, 938 (Mo. 1969)). The reality that insurance

brokers often occupy differing agency positions at various points during the insurance transaction has limited the period during which a broker is an agent of the insured.

Furthermore, Missouri courts have expressed a number of policy concerns when considering the extent of an insurance broker's duty of care, skill, and diligence. See Roth v. Equitable Life Assurance Soc'y of the U.S., 210 S.W.3d 253, 261 (Mo. App. E.D. 2006); Farmer's Ins. Co. v. Am. Family Mut. Ins. Co., 871 S.W.2d 82, 85-86 (Mo. App. E.D. 1994). These concerns include the fact that the nature of the insurance transaction is an "intellectual gamble" that a client should not be able to avoid simply by claiming he or she would have bought additional insurance if the broker had offered it; the client is more familiar with his or her own assets than the insurance broker and thereby more able to decide on appropriate types of insurance; and, as here, our courts are less concerned to protect sophisticated clients. See Roth, 210 S.W.3d at 261. Thus, our courts have been unwilling to require that actions beyond procurement of the requested insurance be included as part of the broker's fiduciary duty of care, skill, and diligence, as agent of the insured, unless there are special circumstances present. See Zeff Distrib. Co. v. Aetna Cas. & Sur. Co., 389 S.W.2d 789, 795 (Mo. 1965); Hlavaty v. Kribs Ford, Inc., 622 S.W.2d 328, 330 (Mo. App. E.D. 1981).

While Missouri courts have discussed in detail their reasoning for finding these limitations on the fiduciary duty of care, skill, and diligence in procuring insurance, there is scant discussion of whether this duty is the *exclusive* fiduciary duty insurance brokers owe their clients. Marsh argues that a duty of loyalty is not an integral part of the fiduciary relationship that exists between the broker and the insured. More specifically, Marsh argues that for us to find a duty of loyalty alongside this limited duty of care

would expand a broker's duties to the insured, contrary to our case law and policy. However, this issue is more complex. Marsh's conclusion seems to call into question our courts' use of the term "agent" to describe an insurance broker and his or her duty.[4] This term by definition suggests more than simply a duty of reasonable care, skill, and diligence.

First, "[a]n agent is a fiduciary with respect to matters within the scope of his agency." State ex rel. Bunting v. Koehr, 865 S.W.2d 351, 353 (Mo. banc 1993) (quoting Restatement (Second) Agency § 13 (1958)); see also Jones v. Kennedy, 108 S.W.3d 203, 208 (Mo. App. S.D. 2003) (citing A.G. Edwards, 978 S.W.2d at 394 (applying fiduciary status to agency relationship of insurance broker-insured)). "Once an agency relationship has been established, a fiduciary relationship arises as a matter of law." A.G. Edwards, 978 S.W.2d at 394. Therefore, the fact that insurance brokers are agents of the insured, albeit in a limited capacity, means that a fiduciary relationship should arise as a matter of law in even that limited scope.

Second, by definition, the concept of an agent's fiduciary duty encompasses a duty of loyalty automatically. Missouri has adopted the Restatement (Second) of Agency,[5] which describes an agent's fiduciary duty of loyalty: "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." § 387 (1958); see also Black's Law Dictionary 523 (7th ed. 1999) ("fiduciary duty" defined in part as "a duty to act with the highest

[4] And in fact, Marsh's counsel conceded the agency relationship during oral argument. When asked, "It's a principal-agent relationship that exists between the broker and Emerson, correct?", Marsh's counsel replied, "It is."

[5] The Restatement (Second) of Agency has been superceded by the Restatement (Third) of Agency, effective 2006. Though we have not seen a Missouri case officially adopting the Restatement (Third), we believe in this instance it is substantially similar and would likely be adopted as well. Section 8.01 of the Restatement (Third) says, "[a]n agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."

degree of honesty and loyalty toward another person and in the best interests of the other person"). It follows that in the limited context of an insurance broker's fiduciary duty to a client, a duty of loyalty attaches.

One case from this Court does assume a duty to disclose, which is contained in the duty of loyalty. See Hlavaty v. Kribs Ford, Inc., 622 S.W.2d 328, 330 (Mo. App. E.D. 1981). After setting forth an insurance broker's fiduciary duty of reasonable care and diligence in procuring insurance, this Court said, "[h]ence, an agent is subject to a duty to use reasonable efforts to give his principal information which is material to the subject matter of the agency." Id. (citing Browder v. Hanley Dawson Cadilac, 379 N.E.2d 1206, 1211) (Ill. App. Ct. 1978) (describing broker-client relationship as fiduciary in nature, requiring agent "act in utmost good faith and must make known to his principal all material facts []."). Though this Court did not identify the duty as a duty of loyalty, nor examine the bounds of the duty, this case is consistent with our precedents toward finding a duty of loyalty.

Marsh argues there is a conflict between the clear policy of our Supreme Court to limit the duties of insurance brokers, and the implication from language in precedent that, though it has not been expressly recognized, the duty of loyalty resides with insurance brokers because of their agency relationship with clients. Although the policy concerns expressed in the cases cited above limit the actions required by insurance brokers, it is not as clear that a broker's responsibility to relate loyally and honestly to his or her client while performing those actions raises the same concerns. Cf. People ex rel. Cuomo v. Wells Fargo Ins. Servs., Inc., 944 N.E.2d 1120, 1122 (N.Y. 2011) (finding that even if no

duty to act exists, insurance broker clearly cannot act in bad faith to principal's detriment).

Other state courts that have considered whether an insurance broker customarily owes a duty of loyalty differ in their conclusions.[6] Some states have decided these matters through legislation,[7] and there appears to be a growing trend toward enacting administrative regulations or statutes to require disclosure of contingent commissions specifically.[8] At this time, we have no such plain legislative announcement of our state's

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[6] For states finding that insurance brokers owe their clients a duty of loyalty, see Genesee Foods Servs., Inc. v. Meadowbrook, Inc., 760 N.W.2d 259 (Mich. Ct. App. 2008); Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 998 P.2d 856 (Wash. 2000) (applying Pennsylvania law). New York has acknowledged a duty of loyalty, but found that undisclosed contingent commissions, without an allegation that they brought any harm to the client, did not violate the duty. People ex rel. Cuomo v. Wells Fargo Ins. Servs., 944 N.E.2d 1120, 1122 (N.Y. 2011) (noting recently enacted regulation requiring disclosure of contingent commissions that did not apply at time of filing).

For states that recognize a fiduciary relationship between broker and client, see European Bakers, Ltd. v. Holman, 338 S.E.2d 702, 705 (Ga. Ct. App. 1985); DOD Techs. v. Mesirow Ins. Servs., Inc., 887 N.E.2d 1, 8 (Ill. App. Ct. 2008); Baldwin v. Lititz Mut. Ins. Co., 393 S.E.2d 306, 307 (N.C. Ct. App. 1990).

In contrast, other states find no fiduciary duty present in broker-insured relationship absent special circumstances. See Baldwin Crane & Equip. Corp. v. Riley & Rielly Ins. Agency, Inc., 687 N.E.2d 1267, 1269 (Mass. App. Ct. 1997) (relationship not normally found to be fiduciary in nature; special circumstances that could create duty include expanded agency agreement, i.e., the insurance agent is holding himself out as consultant or advisor); Slovak v. Adams, 753 N.E.2d 910, 916-17 (Ohio Ct. App. 2001) (finding relationship is ordinary business relationship, not fiduciary, unless there is special confidence between parties which both acknowledge). Thus even these states that do not recognize a fiduciary relationship as a rule do acknowledge that a broker could owe a duty of loyalty to his or her client depending on the circumstances.

[7] At least one state has codified the common law duty of loyalty. Nev. Admin. Code § 683A.716 (2005); see generally Vernon E. Leverty, Full Disclosure of Producer Compensation: The Cheapest E&O Insurance, 19 Fed'n of Reg. Couns. J., Winter 2008, http://www.forc.org/public/journals/48 (giving categories for states' treatment of fiduciary duties and disclosure requirements).

[8] See Wells Fargo, 944 N.E.2d at 1123 (stating nondisclosure of contingent commissions may be bad practice; citing New York's recently adopted regulation requiring disclosure). Cf. DOD Techs., 887 N.E.2d at 8 (finding receipt of undisclosed contingent commissions constituted wrongful misappropriation of premium payments, in violation of state statute, when broker placed policies in broker's interest rather than client's best interest).

Regarding the trend toward disclosure legislation, see Cynthia J. Borrelli, Incentive-Based Compensation, Contingent Commissions and Required Broker Disclosures: Is There a Meeting of the Minds?, 19 Fed'n of Reg. Couns. J., Winter 2008, http://www.forc.org/public/journals/48. The National Association of Insurance Commissioners (NAIC) and the National Counsel of Insurance Legislators (NCOIL) have adopted model insurance producer regulations, which would require brokers to obtain the informed consent of the client before receiving contingent commissions. Id.; Sean M. Fitzpatrick, The Small Laws: Eliot Spitzer and the Way to Insurance Market Reform, 74 Fordham L. Rev. 3041, 3063-64 (2006). Several states have adopted rules similar to the NAIC Model Act, including Arkansas, Arizona, California, Connecticut, Georgia, Illinois, Indiana, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and Wisconsin. See generally Borelli (citing administrative regulations and statutes; detailed

policy regarding these issues, nor any regulation from our state's Department of Insurance. Yet our Missouri Supreme Court has specifically recognized that the insurance broker-client relationship is an agency relationship. Hecker, 891 S.W.2d at 816. Thus, the relationship is fiduciary in nature. A.G. Edwards, 978 S.W.2d at 395.

Our courts have found a duty of loyalty present in other agency relationships, which are similar to the limited insurance broker-insured relationship in the respect that the agent typically acts for the principal in one single business transaction. See Markland v. Travel Travel Southfield, Inc., 810 S.W.2d 81, 83-84 (Mo. App. E.D. 1991) ("A travel agent is a special agent, akin to a broker, which engages in a single business transaction with the principal. . . . And as well, every travel agent owes a duty of loyalty to its principals."); Adams v. Kerr, 655 S.W.2d 49, 53 (Mo. App. E.D. 1983) (real estate broker owes duty of loyalty to seller). Also, when considering the duties of principals, the Western District Court of Appeals has stated that it sees no reason for a distinction between the agency relationships of an insurance broker with its insured and a real estate broker with its customer. Am. Mortgage Inv. Co. v. Hardin-Stockton Corp., 671 S.W.2d 283, 289 (Mo. App. W.D. 1984) (finding like duties of insured and real estate customer).

Therefore, because of our Supreme Court's use of fiduciary and agency language regarding insurance brokers, our state's general agency principles which maintain that a duty of loyalty is intrinsic in any fiduciary relationship, the lack of conflict with our stated policies regarding insurance sales, and our view of similar agency relationships in

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analysis of a few states). New York and New Jersey evaluate contingent commissions on a case-by-case basis, under both state Unfair Trade Practice Acts and a broker's fiduciary duties. Id.

Missouri; we conclude that a duty of loyalty is inherent in an insurance broker's present fiduciary duties as agent for the insured.[9]

Contingent Commissions

In Point I, Emerson argues Marsh violated its fiduciary duty of loyalty to Emerson through the receipt of undisclosed contingent commissions. Emerson argues in Point II Marsh violated its fiduciary duty of skill, care, and diligence when Marsh's acceptance of contingent commissions caused Emerson's premium price to be "inflated."

Point I

First, a fiduciary duty of loyalty requires that an agent disclose to the principal all material facts related to the agency. E.g., Kahn v. Royal Banks of Mo., 790 S.W.2d 503, 507 (Mo. App. E.D. 1990) (citing Groh v. Shelton, 428 S.W.2d 911, 916 (Mo. App. 1968)). Emerson alleged that the contingent commissions Marsh received affected the price of Emerson's premium. It follows that the contingent commission would be a material fact related to the procurement of insurance, falling within the scope of Marsh's agency. See Browder, 379 N.E.2d at 1211 (stating price is material fact).

Second, the duty of loyalty requires that an agent act in the principal's best interest, and that an agent not use his agency for his own advantage to the detriment of the principal. E.g., Kahn, 790 S.W.2d at 507; McKeehan v. Wittels, 508 S.W.2d 277, 281 (Mo. App. W.D. 1974). Emerson alleges Marsh placed insurance with particular

[9] We also note the U.S. District Court, Eastern District of Missouri, memorandum and order remanding the present case to the trial court for lack of federal subject-matter jurisdiction. In its decision, the court considered whether Missouri courts would impose a fiduciary duty of loyalty on insurance brokers, similar to that of real estate brokers and other agents. The court concluded, "[b]ased on Missouri's approach to agency in general, there is a reasonable basis to believe the answer is yes." Emerson Elec. Co. v. Marsh & McLennan Cos., No. 4:05-CV-0455RWS, slip op. at 10 (E.D. Mo. Jan. 22, 2010).

insurers who would pay Marsh a contingent commission. The alleged detriment to Emerson was the "inflated" price paid for the product.[10]

However, our legislature in Section 375.116, subsections 1 and 2, specifically allows insurance brokers to receive contingent commissions:

> 1. An insurance carrier or agent thereof or broker may pay money, commissions or brokerage, or give or allow anything of value, for or on account of negotiating contracts of insurance, or placing or soliciting or effecting contracts of insurance, to a duly licensed broker.
>
> 2. Nothing in this chapter shall abridge or restrict the freedom of contract of insurance carriers or agents thereof or brokers with reference to the amount of commissions or fees to be paid to such brokers and such payments are expressly authorized.

RSMo. (2002). Notably, this statute does not require brokers to disclose these contingent commissions to their clients.[11]

Though a common law fiduciary duty of loyalty requires disclosure of material facts, our state legislature has acknowledged in Section 375.116 that the practice of insurance companies paying contingent commissions to brokers is lawful. Further, our state legislature has specifically chosen not to require insurance brokers to disclose this practice to their clients, implying this practice is not against clients' interests. Therefore, Emerson's petition did not sufficiently state a claim that Marsh breached its fiduciary duty of loyalty to Emerson. Point I is denied.

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[10] Marsh argues that Emerson was not harmed in this transaction, citing case law analyzing similar instructions to obtain the best coverage at the lowest price. Without a developed factual record, we have no way to discern whether Marsh in fact still achieved the best price for the insurance that best met Emerson's request, even with whatever increase the contingent commission may have caused.

[11] Section 375.144, RSMo. (2005), does proscribe concealment of material facts in insurance sales, but this is in the context of a statute entitled "Insurance offers, sales solicitation or negotiation, fraud or misrepresentation." This statute does not apply to the receipt of contingent commissions, which is addressed separately within its own statute. Further, Emerson did not plead fraud or misrepresentation in this case, but a breach of fiduciary duty.

Point II

A broker's duty of skill, care, and diligence in the procurement of insurance includes "a duty to exercise good faith and reasonable diligence to procure the insurance on the best terms he can obtain." Zeff, 389 S.W.2d at 795 (quoting, e.g., 44 C.J.S. Insurance § 172, p. 861). "Best terms" is not necessarily synonymous with "lowest price." See Tunison v. Tillman Ins. Agency, 362 S.E.2d 507, 509 (Ga. Ct. App. 1987). Yet a broker must also follow the specific instructions of the principal. "[I]f a broker or agent of the insured neglects to procure insurance, or does not follow instructions, . . . he is liable to his principal for any loss he may have sustained thereby." Kap-Pel Fabrics, Inc. v. R.B. Jones & Sons, Inc., 402 S.W.2d 49, 53 (Mo. App. 1966).

Marsh argues that if Emerson believes Marsh did not follow their agreement, then the proper suit is one for breach of contract. However, when a client believes the broker has not followed through on his or her duties, the client may elect to sue either for breach of contract or for breach of fiduciary duty. See Barnes, 612 S.W.2d 787 (Mo. App. E.D. 1981); Kap-Bel Fabrics, 402 S.W.2d at 55. It is not for us to dictate Emerson's choice of legal theory, but to determine whether the theory Emerson pursued has merit.

Emerson alleges that it hired Marsh to "recommend insurance policies that met the plaintiff's needs at the lowest possible price." Marsh argues with the cases cited above that the lowest possible price cannot be the only criterion involved in getting the best terms available, because quality may be sacrificed in purchasing the least expensive policy. Emerson's petition regarding the violation of Marsh's duty of skill, care, and diligence rests on the word "inflated," implying that although Marsh secured a policy that

met Emerson's needs, the price Emerson paid for it was not the lowest possible, which violated Emerson's instructions and Marsh's duty.

Because this case resolved at the pleadings stage, we have no factual record from which to discern whether Emerson could have paid a lower price if Marsh did not have arrangements with the insurance companies to receive contingent commissions. We also are unable to review the brokerage agreement between Marsh and Emerson, or the placement service agreements between Marsh and the insurance companies, as they were not part of the record.

It is possible, as Emerson argues, that Marsh could have obtained the same policy without receiving a contingent commission, thus making Emerson's premiums lower. Yet, it is also possible that Marsh, as the world's largest provider of insurance brokerage services, could have secured a lower base premium price for their clients through Marsh's arrangement with the insurance companies, a price that would be unavailable to those without such arrangements. In the latter case, even with the inflation of the price from a contingent commission, Marsh still could have secured the lowest overall price. We also note the inherent differences in credit quality and risk associated with various insurance companies, and again we recognize that insurance at the lowest possible price may not equate with the "best terms." Therefore, this issue may be more appropriately disposed of after discovery by summary judgment.

However, on review of a judgment on the pleadings, we must give all reasonable inferences to Emerson, thus we are unable to say that Emerson would not be able to prevail under the petition's stated theory that Marsh violated its duty of skill, care, and

diligence by causing Emerson to pay an inflated premium price contrary to instructions. Accordingly, we reverse and remand. Point II is granted.

Premium Interest

In Point III, Emerson argues Marsh breached its fiduciary duty to Emerson by earning and retaining interest from Emerson's premium payments before forwarding the monies to the insurance companies. The issues are first, for whom Marsh was acting during the time Marsh held Emerson's premium payments, and second, whether the interest earned belongs to Marsh's principal.

First, Marsh argues it is established in Missouri that when a broker collects premiums, he or she does so on behalf of the insurer. Marsh relies mainly on Section 375.051.1, RSMo. (2002), Graue v. Mo. Prop. Ins. Placement Facility, 847 S.W.2d 779, 784 (Mo. banc 1993), and Monia v. Melahn, 876 S.W.2d 709, 713 (Mo. App. E.D. 1994). However, this authority is applicable to insurance agents, which are distinct from insurance brokers. Graue, 847 S.W.2d at 783. Insurance agents are not considered to have agency relationships with individual clients, but rather they act as captive agents for an insurer. Id. In contrast, brokers act on behalf of the insured, rather than a particular company. As discussed above, brokers do have an agency relationship with their clients. While it is true brokers can sometimes act as insurance agents and therefore collect premiums on behalf of the insurer, see id., it is not clear to us that every time brokers collect premiums they do so on behalf of the insurer.

However, Section 375.051.2 is also instructive:

> Any insurance producer who shall act on behalf of any applicant for insurance or insured within this state, or who shall, on behalf of any applicant for insurance or insured, seek to place insurance coverage, deliver policies or renewal receipts and collect premiums

> thereon, or who shall receive or collect moneys from any source or on any account whatsoever, shall be held responsible in a trust or fiduciary capacity to the applicant for insurance or insured for any money so collected or received by him or her.

Section 375.051.2, RSMo. (2002). Therefore, these two sections read together make it clear that insurance producers, including agents or brokers, see Graue, 847 S.W.2d at 783 (applying prior, substantially same statute, using term "licensed producer"), can collect premiums on behalf of either the insurance company or the insured. The trial court assumed, based on Emerson's petition and the need to make all inferences in Emerson's favor, subsection 2 applied to the collection of premiums in this case.

However, as discussed above, the agency relationship between a broker and an insurer, along with any corresponding duties, typically ends at procurement of the requested insurance. Hecker, 891 S.W.2d at 816. It is possible parties can contract to extend the agency relationship, for example, to include the broker maintaining the insurance.[12] See Zeff, 389 S.W.2d at 795. Yet paragraph 8 of Emerson's petition states that Emerson hired Marsh "to act as [Emerson]'s fiduciary in procuring various insurance policies[.]" We do not see anything in the petition alleging that the agency relationship extended beyond the procurement of insurance. Therefore, while the trial court assumed that Marsh held the premiums for Emerson, we cannot because it is not clear from the pleadings whether the procurement stage included any or all of the times Emerson paid premiums.[13]

Nevertheless, the trial court found that even if the premiums were held on behalf of Emerson, Marsh did not violate a duty in retaining the interest earned from the

[12] Emerson argues as much in its brief: "It is uncontested that Marsh was, at all times, also acting as an agent for Emerson."

[13] We decline to consider whether the statute itself creates additional duties, though we note that issue has not been addressed in our research.

premiums. The trial court reasoned that under Section 375.051.2, the broker is responsible "for the actual premiums entrusted to it." The court also noted subsection 3 of the same statute, which makes clear that insurance producers are not required to maintain separate bank accounts for each of their clients. Section 375.051.3. The court concluded that because Marsh had no fiduciary duty beyond procuring insurance, as long as Marsh forwarded the premiums to the insurance companies, Marsh did not violate any duty by retaining interest.

We agree. Point III is denied.

Conclusion

We would affirm the judgment in part, reverse in part, and remand. Because the issue of whether the fiduciary relationship between an insurance broker and a client includes a duty of loyalty has not been expressly considered by the Supreme Court, and because we believe it to be a question of importance in our state, we order this case transferred to the Missouri Supreme Court, pursuant to Rule 83.02.

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Gary M. Gaertner, Jr., Presiding Judge

Mary K. Hoff, J., concurs.
Patricia L. Cohen, J., concurs.