

IN THE SUPREME COURT OF MISSOURI  
EN BANC

EMERSON ELECTRIC CO.,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	No. SC92026
	)	
MARSH & McLENNAN COMPANIES,	)	
et al.,	)	
	)	
Defendants/Respondents.	)	

Appeal From The Circuit Court Of St. Louis City, Missouri  
The Honorable Robert H. Dierker  
Circuit Judge

Appellant's Substitute Brief

Mark G. Arnold, MO #28369  
Husch Blackwell, LLP  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105  
Phone: (314) 480-1500  
Facsimile: (314) 480-1505  
E-mail:  
[mark.arnold@huschblackwell.com](mailto:mark.arnold@huschblackwell.com)

John C. Cabaniss, WI #1002857  
Cabaniss Law  
839 N. Jefferson Street, Suite 400  
Milwaukee, WI 53202  
Phone: (414) 220-9211  
Facsimile: (414) 220-9214  
E-mail: [john@cabanisslaw.com](mailto:john@cabanisslaw.com)

Dorothy White-Coleman, MO #31693  
Susie McFarland, MO #29992  
White Coleman & Associates, LLC  
500 North Broadway, Suite 1300  
St. Louis, MO 63101-2100  
Phone: (314) 621-7676  
Facsimile: (314) 621-0959  
E-mail:  
[whitecoleman@whitemcoleman.net](mailto:whitecoleman@whitemcoleman.net)

Randall D. Crocker, WI #1000251  
Thomas Armstrong, WI #1016529  
von Briesen & Roper, S.C.  
411 East Wisconsin Ave., Suite 700  
P.O. Box 3262  
Milwaukee, WI 53202-3262  
Phone: (414) 276-1122  
Facsimile: (414) 276-6281  
E-mail: [rcrocker@vonbriesen.com](mailto:rcrocker@vonbriesen.com)  
[tarmstro@vonbriesen.com](mailto:tarmstro@vonbriesen.com)

*Attorneys for Plaintiff/Appellant Emerson Electric Co.*

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### **Jurisdictional Statement**

This is a civil action for money damages for breach of an insurance broker's fiduciary duty to its client. The trial court granted the broker's motion for judgment on the pleadings and dismissed the action with prejudice. L.F. 99.

The court of appeals transferred the appeal to this Court pursuant to Rule 83.02 for resolution of issues of general interest and importance, and this Court now "review[s] the cause as though on original appeal." Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. banc 1985).

### Statement of Facts

The facts in this case are simple and, because the appeal is from an order dismissing for failure to state a cause of action, uncontested. Defendant Marsh USA, together with its affiliates (collectively “Marsh”) is one of the largest insurance brokers in the world. L.F. 19 ¶ 7. It holds itself out to its clients as a fiduciary that will act solely on their behalf in purchasing insurance. Id.

Plaintiff Emerson Electric Co. (“Emerson”) is a global industrial company that designs, manufactures and sells numerous products. L.F. 19 ¶ 1. Emerson retained Marsh, and paid it fees, to act as Emerson’s broker in recommending and purchasing insurance policies on behalf of Emerson. L.F. 18 ¶ 2:

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 these services, plaintiff paid substantial amounts to defendants to recommend insurance policies that met the plaintiff’s needs at the lowest possible price.

L.F. 19 ¶ 8.

In the early 1990’s, Marsh secretly entered into various agreements with insurance companies whereby Marsh obtained substantial rewards for directing insurance business to them. L.F. 19 ¶ 9. Marsh did not disclose these secret payments to Emerson. Id. As a result of the secret payments, Emerson “paid an inflated price for its insurance policies,” L.F. 20 ¶ 9, and thus did not get insurance on the terms it had requested.

In addition, Marsh directed Emerson to pay its premiums directly to Marsh. Unbeknownst to Emerson, Marsh did not immediately forward those premiums to the insurance companies. Instead, Marsh invested those premium payments to earn interest, which it retained. L.F. 20 ¶ 10.

Emerson's petition alleged that the receipt and retention of both the kickbacks and the interest income violated Marsh's fiduciary obligations to Emerson. L.F. 21 ¶ 17. As redress for that breach, the petition sought restitution of all fees Emerson had paid to Marsh, and all kickbacks and interest income paid to Marsh in respect of Emerson's purchases. L.F. 20 ¶ 12. Emerson also sought punitive damages. L.F. 21 ¶ 21.

The defendants included the three Marsh corporate entities and Joseph Lampen, the Marsh account executive who supervised the Emerson account. L.F. 18-19 ¶ 5. As Emerson and Mr. Lampen are both citizens of Missouri, L.F. 18 ¶¶ 1; 5, his presence as a defendant meant that the federal courts lacked diversity jurisdiction.

Marsh nonetheless removed the case to the United States District Court for the Eastern District of Missouri, arguing that Emerson had fraudulently joined Mr. Lampen as a defendant. The Judicial Panel for Multidistrict Litigation then transferred the case to the United States District Court for the District of New Jersey for coordinated pretrial proceedings. The Panel held that this case, like the others already transferred, "present questions relating to allegedly improper

contingent commissions or kickbacks paid to broker defendants by insurance companies.” L.F. 44.

In July 2009, the Panel transferred the case back to the Eastern District of Missouri. L.F. 11. In September 2009, Emerson filed a memorandum in support of its motion to remand the case to the circuit court of the City of St. Louis. L.F. 13. In January 2010, the District Court granted that motion. L.F. 14.

In June 2010, defendants filed a motion for judgment on the pleadings, arguing that the petition “fail[ed] to state a claim upon which relief could be granted.” L.F. 32. On July 21, 2010, the trial court heard oral argument on that motion, L.F. 87, and on October 26, 2010, App. A1, the trial court granted it. L.F. 99. This timely appeal followed. L.F. 100.

**Points Relied On**

- I. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Kickback Claim, Because Marsh Owed Emerson A Duty To Refrain From Self-Dealing, In That Marsh Was Acting As Emerson's Agent.

A.G. Edwards & Sons, Inc. v. Drew,

978 S.W.2d 386 (Mo. App. 1998)

Restatement (Second) of Agency § 387 comment b.

Vogel v. A.G. Edwards & Sons, Inc.,

801 S.W.2d 746 (Mo. App. 1990)

Missouri Highway & Transp. Com'n v. Sample,

702 S.W.2d 535 (Mo. App. 1985)

- II. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Kickback Claim, Because The Petition Pleaded Facts Establishing That Marsh Breached A Fiduciary Duty To Emerson, In That Marsh Was Supposed To Recommend Suitable Insurance At The Lowest Price And, Through Its Self-Dealing, Caused Emerson To Pay Inflated Prices.

Zeff Dist. Co. v. Aetna Cas. & Surety Co.,

389 S.W.2d 789 (Mo. 1965)

Jarnagin v. Terry,

807 S.W.2d 190 (Mo. App. 1991)

3 Couch on Insurance (3<sup>rd</sup> Ed. 1995) § 46.30 at 46-37

Euclid Plaza Associates v. African American Law Firm,

55 S.W.3d 446 (Mo. App. 2001)

- III. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Interest Claim, Because Marsh Had A Duty To Pay That Interest To Emerson, In That Marsh Was Acting As A Fiduciary Of Emerson.

Restatement (Second) of Agency, § 388, comment a.

Missouri Highway & Transp. Com'n v. Sample,

702 S.W.2d 535 (Mo. App. 1985)

### **Standard of Review**

A motion for judgment on the pleadings admits all the “well-pleaded facts of the non-moving party’s pleading.” Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596, 599 (Mo. banc 2007), and cases there cited. In applying that standard, the non-moving party is “accorded all reasonable inferences drawn from” those well-pleaded facts. Twehous Excavating Co. v. L.L. Lewis Investments, LLC, 295 S.W.3d 542, 546 (Mo. App. 2009).

“A motion for judgment on the pleadings . . . is not favored.” In re Marriage of Busch, 310 S.W.3d 253, 259 (Mo. App. 2010). A judgment on the pleadings is appropriate only when “the question before the court is strictly one of law.” Eaton, 224 S.W.3d at 599. If the “pleadings raised an issue of material fact,” a judgment on the pleadings is “not appropriate.” Id. at 600.

## Argument

Under Missouri law, an insurance broker is an agent of the insured and therefore owes certain fiduciary obligations to the insured. Among them is the duty of loyalty, which requires the agent “to act **solely** for the benefit of the principal in **all matters** connected with his agency.” Restatement (Second) Agency § 387 (emphasis added), App. A14.

Thus, “the duty of loyalty ordinarily requires trustees to avoid all transactions that involve self-dealing.” 3 Scott & Ascher on Trusts, § 17.2 at 1079 (5<sup>th</sup> Ed. 2007), App. A22. Self-dealing occurs when a trustee or other fiduciary “while engaged in a business transaction for the trust, attempts at the same time to secure a financial advantage for himself.” Bogert, The Law of Trusts and Trustees, § 543 at 235 (Rev. 2<sup>nd</sup> Ed. 1993), App. A25:

If a trustee or other fiduciary, while acting for his beneficiary or principal, receives a gift from a party with whom he is transacting business for the trust (whether called a bonus, commission or by other name), that benefit may be recovered by the beneficiary from the trustee even though no damage to the trust is shown . . . . The tendency to introduce a selfish interest into such a transaction is obvious.

Id. § 543(P) at 382-83, App. A26-27.

Here, Marsh engaged in self-dealing, and therefore violated its duty of loyalty, in three ways. It accepted and retained secret commissions from the insurance companies with whom it placed Emerson’s business. In order to

maximize those secret commissions, it did not seek out the lowest cost suitable insurance. And it accepted and retained interest on the premiums before forwarding them to the insurance companies.

**I. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Kickback Claim, Because Marsh Owed Emerson A Duty To Refrain From Self-Dealing, In That Marsh Was Acting As Emerson's Agent.**

The essence of Emerson's kickback claim is that Marsh secretly accepted commissions from insurance companies to whom it sent Emerson's insurance business – *i.e.*, engaged in self-dealing. Marsh concedes, as it must, that it was acting as Emerson's agent and hence was a fiduciary at least for some purposes. The duty to refrain from self-dealing is inherent in any fiduciary relationship.

**A. Marsh Breached Its Duty Of Loyalty By Accepting Secret Commissions.**

There is no question that an insurance broker owes some fiduciary duties to its clients. The leading case is A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386 (Mo. App. 1998). Edwards retained Drew to procure stop-loss health insurance coverage for its employees. Drew did not procure the kind of coverage that Edwards wanted and Edwards sustained several hundred thousand dollars in losses as a result.

The trial court submitted Edwards' claim for breach of fiduciary duty to the jury and the court of appeals affirmed:

When 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.

...

As AGE's agent, D & H owed it a fiduciary duty with respect to procuring an insurance policy according to AGE's wishes. . . . Once an agency relationship has been established, a fiduciary relationship arises as a matter of law.

978 S.W.2d at 394-95. Accord, Metal Exchange Corp. v. J.W. Terrill, Inc., 173 S.W.3d 672, 681 n.3 (Mo. App. 2005) ("Terrill, as broker, owed Metal Exchange a fiduciary duty to procure the WC/EL and CUP policies in accordance with Metal Exchange's wishes").

The basis for the fiduciary duty is the broker's status as an agent. "An agent is a fiduciary with respect to matters within the scope of his agency." Edwards, 978 S.W.2d at 394. Accord, Weekly v. Mo. Prop. Ins. Placement Facility, 538 S.W.2d 375, 379 (Mo. App. 1976) ("an insurance broker is generally the agent of those for whom insurance is procured"); Pittman v. Great American Life Ins. Co., 512 S.W.2d 857, 861 (Mo. App. 1974) (insurance agent "becomes the party's agent").

Missouri courts have traditionally relied on the Restatement (Second) of Agency to determine the scope of an agent's duty of loyalty. E.g., Scanwell Freight Express STL, Inc. v. Chan, 162 S.W.3d 477, 479 (Mo. banc 2005) (citing § 387); Pollock v. Berlin-Wheeler, Inc., 112 S.W.3d 73, 78 (Mo. App. 2003); Missouri Highway & Transp. Com'n v. Sample, 702 S.W.2d 535, 537 (Mo. App. 1985).

As noted, § 387 of the Restatement requires the agent "to act **solely** for the benefit of the principal in **all** matters connected with his agency" (emphasis added). An agent's "duties of loyalty to the interests of [the] principal are the same as those of a trustee to [its] beneficiaries." Id. comment b, App. A15.

The "most fundamental" duty of a trustee is the "duty of loyalty," which "precludes self-dealing." Ramsey v. Boatmen's First Nat'l Bank, 914 S.W.2d 384, 387 (Mo. App. 1996). Accord, Tyler v. Citizens Home Bank, 670 S.W.2d 954, 956 (Mo. App. 1984) ("[t]rustees owe undivided loyalty" and must "refrain from engaging in self-dealing").

It makes no difference that the duty to exercise skill and care may be limited; the duty of loyalty is not. In Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746 (Mo. App. 1990), this Court held that the fiduciary duties of a stockbroker to a client who manages his or her investments are "somewhat limited." 801 S.W.2d at 752. Those limited duties, however, include the duty to "refrain from self dealing." Id. Accord, State ex rel. Painewebber, Inc. v.

Voorhees, 891 S.W.2d 126, 130 (Mo. banc 1995); Faron v. Waddell & Reed, 930 S.W.2d 508, 511 (Mo. App. 1996).

Similarly, Missouri courts have recognized that, while “controlling shareholders are not fiduciaries in the strict sense,” they do have a duty to “refrain from using their control to obtain a profit for themselves at the injury or expense of the minority.” Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. App. 1976). The first “substantive area[] in which the duty of loyalty is subject to breach” by a stockholder is “self-dealing.” Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896, 904 (Mo. banc 1990) (internal punctuation omitted).

A real estate broker owes fiduciary obligations to the seller, Packard v. KC One, Inc., 727 S.W.2d 435, 436 (Mo. App. 1987), although the “standard is dependent on the nature and extent of the job undertaken by the broker.” American Mortgage Investment Corp. v. Hardin-Stockton Corp., 671 S.W.2d 283, 293 (Mo. App. 1984). The broker nonetheless owes the seller a duty of “undivided loyalty.” Adams v. Kerr, 655 S.W.2d 49, 53 (Mo. App. 1983). Accord, Markland v. Travel Travel Southfield, Inc., 810 S.W.2d 81, 84 (Mo. App. 1991) (“every travel agent owes a duty of loyalty to its principals”).

If a stockbroker, a real estate broker, and a travel agent must refrain from self-dealing, why should a different rule apply to an insurance broker? There is no principled reason to distinguish insurance brokers from any of these other categories of limited fiduciary responsibility. The “prohibition against self-dealing . . . inheres in the fiduciary relationship.” Norlin Corp. v. Rooney, Pace

Inc., 744 F.2d 255, 264 (2<sup>nd</sup> Cir. 1984). Accord, Schoen v. Schoen, 804 P.2d 787, 794 (Ariz. App. 1990).

A blanket prohibition against self-dealing by agents, even agents whose duties of care and skill are limited, is essential to the fiduciary relationship:

The doctrine of law that forbids an agent to buy from or sell to himself is not necessarily based on the idea that such deal in dirt is (to speak colloquially) a “dirty” deal; But it is rather based on the idea of closing the door to the temptation to commit fraud.

Sample, 702 S.W.2d 538 (internal punctuation omitted). Accord, Burton v. Pet, Inc., 509 S.W.2d 95, 100 (Mo. 1974) (“[t]he law, recognizing that, in general, human nature is too weak to assure faithful service in such circumstances, has absolutely forbidden such dual position”).

Emerson freely acknowledges that Missouri courts have held that insurance brokers have no duty to advise their clients of the wisdom of obtaining different or additional insurance. Those cases relate to a broker’s duties of skill and care, which the courts have held may be limited. They do not in any way support a limitation on the duty of loyalty.

**B. Section 375.116, R.S.Mo., Does Not Authorize Secret Commissions.**

The court of appeals sua sponte held that § 375.116, R.S.Mo., authorized Marsh to receive kickbacks without either disclosing them to Emerson or

obtaining Emerson's consent. Neither party briefed that issue in either the trial court or the court of appeals. Rule 83.08(b) would normally preclude either party from raising the issue here. Since Marsh would undoubtedly raise the issue on remand, and no reported opinion has ever construed the statute, judicial economy suggests that the Court address this issue as well.

The statute provides, in pertinent part:

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.<sup>1</sup>

On their face, this statute regulates the relationship between insurance companies and brokers, not relations between brokers and insureds. The statute declares that insurance companies may lawfully pay commissions to brokers. It

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<sup>1</sup> A 2003 amendment to the statute replaced the phrase "insurance carrier or agent thereof or broker" with the phrase "insurance company or insurance producer." The amendment made no substantive change.

says absolutely nothing about whether, between broker and insured, the broker may retain such commissions.

It violates no common law contract rule for an insurance company to pay commissions to a broker. Indeed, at common law, the broker may retain those commissions if it (1) makes full disclosure to the insured; and (2) obtains the insured's consent.

Every section of chapter 13, Title C, of the Restatement (Second) of Agency, dealing with an agent's duty of loyalty, is prefaced "[u]nless otherwise agreed." An agent who, "without knowledge of the principal," receives a commission from a third party must pay it to the principal. Restatement § 388 comment a, App. A16. The "agent can properly retain gratuities received on account of the principal's business if . . . an agreement to this effect is found." Id. comment b, App. A17.

Nothing in § 375.116 purports to alter these common law rules. Under Missouri law, "statutes displacing common law remedies are to be strictly construed, and if the question is close, the balance should be struck in favor of retaining the common law remedy." Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 69 (Mo. banc 2000) (citation omitted). If "there is no conflict between a common-law remedy and the statute, the common-law remedy is to be given effect." Wince v. McGarrah, 972 S.W.2d 641, 643 (Mo. App. 1998).

Here, there is absolutely no conflict between § 375.116 and Marsh's common law obligation to pay kickbacks to Emerson, absent full disclosure and

consent. Marsh is free to make whatever contractual arrangements it wishes with insurance companies. Without full disclosure and consent, however, it is not free to retain those commissions.

When Marsh agreed to procure insurance for Emerson, Marsh became a fiduciary for at least some purposes. Because the duty to refrain from self-dealing is inherent in any fiduciary relationship, the petition stated a cause of action to recover the kickbacks. The Court must reverse the judgment for that reason alone.

**II. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Kickback Claim, Because The Petition Pleaded Facts Establishing That Marsh Breached A Fiduciary Duty To Emerson, In That Marsh Was Supposed To Recommend Suitable Insurance At The Lowest Price And, Through Its Self-Dealing, Caused Emerson To Pay Inflated Prices.**

The trial court's rationale for its ruling was that an insurance broker's fiduciary obligations to its clients are limited to procuring insurance policies "in accordance to the client's wishes." L.F. 95. For the reasons set forth in Point I-B, Emerson believes that the duty to refrain from self-dealing is inherent in any fiduciary relationship.

Even if the trial court got the law right, however, it misapplied it. The petition clearly alleges that the "client's wishes" included "insurance policies that met the plaintiff's needs at the lowest possible price," L.F. 19, and that, due to the

kickbacks, “plaintiff paid an inflated price for its insurance policies.” L.F. 20. As an agent, Marsh had a fiduciary obligation to follow that instruction. Moreover, under Missouri law, the broker has a fiduciary obligation to obtain the lowest cost insurance reasonably available even without a specific instruction.

“The nature of the agency relationship is consensual, and actual authority is created when the principal instructs the agent specifically how to act.” Euclid Plaza Associates v. African American Law Firm, 55 S.W.3d 446, 449 (Mo. App. 2001). So long as the agency relationship exists, an “agent is bound to obey the specific instructions of the principal” and is “responsible for the full loss caused by any violation of that duty.” Jarnagin v. Terry, 807 S.W.2d 190, 194 (Mo. App. 1991).

Here, the petition pleads that Emerson “paid substantial amounts to defendants to recommend insurance policies that met the plaintiff’s needs at the lowest possible cost.” L.F. 19 ¶ 8. So the instruction that Emerson gave to its agent was not merely to procure appropriate kinds of insurance in appropriate amounts. It was to do so at the lowest possible price.

The trial court acknowledged that Missouri law imposes a fiduciary duty on brokers to procure insurance policies “in accordance to the client’s wishes.” L.F. 95. If Marsh had failed to procure the requested insurance, in the requested amounts, the trial court apparently would agree that it had violated its fiduciary duty and would be liable for Emerson’s losses. When Marsh failed to procure those policies at the lowest price, causing Emerson to pay “inflated prices,” L.F.

20 ¶ 9, to cover the cost of the kickbacks to Marsh, the trial court finds no fiduciary obligation. That is utterly inconsistent with the agent's duty to obey the instructions of its principal.

The trial court recognized that duty but unaccountably failed to apply it to the kickbacks. As a general rule, a broker has no duty to maintain insurance because the agency "ceases on execution and delivery of the policy." Hecker v. Missouri Prop. Ins. Placement Facility, 891 S.W.2d 813, 816 (Mo. banc 1995). As the trial court held, however, when "an agent explicitly agrees to maintain the insurance, he owes a duty to insure that the policy is maintained." L.F. 94. The same rule must apply when the principal instructs the agent to obtain the lowest cost insurance.

Indeed, even without an explicit instruction, Marsh owed a fiduciary duty to obtain the lowest cost insurance and the trial court's holding that "[n]o Missouri case" imposes such a duty, L.F.95, is flat wrong. In Zeff Dist. Co. v. Aetna Cas. & Surety Co., 389 S.W.2d 789 (Mo. 1965), the Supreme Court held that "[a]n insurance broker . . . is under a duty to exercise good faith and reasonable diligence to procure the insurance **on the best terms he can obtain.**" 389 S.W.2d at 795 (emphasis added). The trial court cited Zeff in its order, L.F. 94-95, but unaccountably failed to follow it.

Missouri hardly stands alone in imposing a fiduciary duty on the broker to obtain the best terms. The broker is "obligated to exercise the strictest veracity, candor and good faith" in "obtaining as good terms as are reasonably possible." 3

Couch on Insurance (3<sup>rd</sup> Ed. 1995) § 46.30 at 46-37, App. A19. Accord, Beacon Indus., Inc. v. Walter Kaye Associates, Inc., 789 F.2d 172, 174 (2<sup>nd</sup> Cir. 1986) (“Connecticut would hold an insurance broker to a standard of reasonable care in discharging the obligation . . . to obtain the best rates available”); Kentucky Central Life Ins. Co. v. LeDuc, 814 F.Supp. 832, 840-41 (N.D. Cal. 1992) (“broker must exercise good faith and reasonable skill and diligence in . . . obtaining the best terms possible”); Browder v. Hanley Dawson Cadillac Co., 379 N.E.2d 1206, 1211 (Ill. App. 1978) (if agency is established “failure to disclose the availability of comparable lower cost insurance would be a breach of fiduciary duty”).

What apparently motivated the trial court was a line of Missouri cases holding that “insurance agents do not have a general duty to advise customers about their particular insurance needs.” Busey Truck Equipment, Inc. v. Am. Family Mut. Ins. Co., 299 S.W.3d 735, 738 (Mo. App. 2009). But “these statements of law are not of assistance” because Emerson’s claim “is based upon Agent’s alleged failure to obtain the coverage” Emerson requested, id. at 738-39: suitable policies of insurance **at the lowest possible cost.**

The trial court correctly held that “the alleged actions of Defendants would violate general fiduciary principles, if such a fiduciary relationship between the parties existed.” L.F. 92. It also recognized that a fiduciary holds any commission that it receives from the insurance company in constructive trust for the insured. Id. Since the petition unquestionably alleged facts supporting the existence of a

fiduciary relationship, it stated a cause of action. The Court must reverse the judgment for this reason alone.

**III. The Trial Court Erred In Granting Judgment On The Pleadings To Marsh On Emerson's Interest Claim, Because Marsh Had A Duty To Pay That Interest To Emerson, In That Marsh Was Acting As A Fiduciary Of Emerson.**

The petition also sought recovery of the interest that Marsh earned on premiums paid by Emerson. The petition stated a cause of action with respect to that interest because Marsh received it in connection with transactions in which it was acting as a fiduciary to Emerson.

The Restatement is absolutely clear on Marsh's duties with respect to the interest:

Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.

Restatement (Second) of Agency, § 388, App. A16. The comment makes clear that this is a strict liability rule:

Ordinarily, the agent's primary function is to make profits for the principal, and his duty to account includes accounting for any unexpected and incidental accretions whether or not received in violation of duty. Thus, an agent who, without the knowledge of the principal, receives something in

connection with, or because of, a transaction conducted for the principal, has a duty to pay this to the principal even though otherwise he has acted with perfect fairness to the principal and violates no duty of loyalty in receiving the amount.

Id. comment a, App. A16.

There is no question that Marsh's retention of interest on the premiums qualifies under that rule. Marsh obtained Emerson's premium payment solely "in connection with" and "because of" a "transaction conducted for the principal": the purchase of insurance.

Section 388's third illustration is almost directly in point. The agent advances the premium for insurance on the principal's premises. Thereafter, the insurance company declares a premium rebate and pays it to agent. "A is under a duty to credit this to P in spite of a contrary usage among insurance agents, not known to P." App. A17.

In Sample, this Court applied § 388. Sample was a district agent for the Highway Commission, whose job duties including coordinating property appraisals. The Commission retained Crain to conduct such appraisals, paying him in excess of \$100,000. There was no evidence that Crain's charges exceeded the fair market value of his services.

Unbeknownst to the Commission, Crain was secretly sharing a portion of those fees with Sample. The Commission sued Sample for recovery of the shared

portions of the fee. The trial court entered judgment for Sample but this Court reversed:

The stipulated facts clearly reveal that defendant, a public employee entrusted with substantial responsibility, breached his duty of loyalty to his principal by secretly dealing with an adverse party for his own advantage. .

..

The trial court erred in finding for the defendant. Plaintiff is entitled to recover for secret profits and commissions paid to defendant by Crain.

702 S.W.2d at 538.

The petition clearly states a cause of action for breach of fiduciary duty in retaining interest on premiums paid to Marsh. The judgment must be reversed for that reason alone.

### **Conclusion**

For these reasons, Emerson respectfully prays that the Court reverse the judgment of dismissal and remand the case for discovery and trial.

Respectfully Submitted,

/s/ Mark G. Arnold

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Mark G. Arnold, MO #28369  
Husch Blackwell, LLP  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105  
Phone: (314) 480-1500  
Facsimile: (314) 480-1505  
E-mail:  
[mark.arnold@huschblackwell.com](mailto:mark.arnold@huschblackwell.com)

Dorothy White-Coleman, MO #31693  
Susie McFarland, MO #19132  
White Coleman & Associates, LLC  
500 North Broadway, Suite 1300  
St. Louis, MO 63101-2100  
Phone: (314) 621-7676  
Facsimile: (314) 621-0959  
E-mail:  
[whitecoleman@whitecoleman.net](mailto:whitecoleman@whitecoleman.net)

John C. Cabaniss, WI #1002857  
Cabaniss Law  
839 N. Jefferson Street, Suite 400  
Milwaukee, WI 53202  
Phone: (414) 220-9211  
Facsimile: (414) 220-9214  
E-mail: [john@cabanisslaw.com](mailto:john@cabanisslaw.com)

Randall D. Crocker, WI #1000251  
Thomas Armstrong, WI #1016529  
von Briesen & Roper, S.C.  
411 East Wisconsin Ave., Suite 700  
P.O. Box 3262  
Milwaukee, WI 53202-3262  
Phone: (414) 276-1122  
Facsimile: (414) 276-6281  
E-mail: [rcrocker@vonbriesen.com](mailto:rcrocker@vonbriesen.com)  
[tarmstro@vonbriesen.com](mailto:tarmstro@vonbriesen.com)

*Attorneys for Plaintiff/Appellant  
Emerson Electric Co.*

**Certificate Of Compliance**

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 4,561 words, exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Word 2003. The undersigned counsel further certifies that the service copies of the CD have been scanned and are free of viruses.

/s/ Mark G. Arnold  
Mark G. Arnold

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 11, 2011, I electronically filed a true and accurate copy of the foregoing brief and appendix with the Clerk of the Court by using the Missouri eFiling System and a true and accurate copy of the brief and appendix including a CD containing a virus-free electronic version of the brief and appendix were forwarded on October 11, 2011, by first class mail, postage prepaid, to:

David P. Niemeier, Esq.  
Kevin F. Hormuth, Esq.  
Greensfelder Hemker & Gale, P.C.  
10 South Broadway, Suite 2000  
St. Louis, MO 63102

Mitchell J. Auslander, Esq.  
Christopher J. St. Jeanos, Esq.  
Deirdre N. Hykal, Esq.  
Willkie Farr & Gallagher LLP  
787 Seventh Avenue  
New York, NY 10019

*Attorneys for Defendants/Respondents*

/s/ Mark G. Arnold  
Mark G Arnold