IN THE SUPREME COURT OF MISSOURI

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

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

RESPONDENTS' SUBSTITUTE BRIEF

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SUMMARY OF ARGUMENT

This case was transferred to this Court, pursuant to Rule 83.02, following a Court of Appeals decision that affirmed in part and reversed in part the trial court's dismissal of the Petition filed by Plaintiff-Appellant Emerson Electric Company ("Emerson") against its insurance broker, Marsh USA Inc. ("Marsh"). Emerson appealed the trial court's decision to the Court of Appeals, seeking reversal of the dismissal of only a single count in the Petition – the breach of fiduciary duty claim – and against only a single defendant, Marsh USA Inc. The dismissal of the other three counts and the other three defendants is, therefore, final.

Emerson's remaining claim is that Marsh breached the fiduciary duty it owed to Emerson by (i) receiving certain types of commissions from insurers, known as contingent commissions, (ii) receiving interest on the premiums it received from Emerson on behalf of Emerson's insurers, and, alternatively, (iii) for not obtaining insurance for Emerson at the absolute lowest price.

Both the trial court and the Court of Appeals correctly held that Emerson's claim that Marsh breached a duty to Emerson by receiving contingent commissions should be dismissed. The Missouri Legislature "specifically allows insurance brokers to receive contingent commissions" and "has specifically chosen not to require insurance brokers to disclose this practice to their clients, implying this practice is not against clients' interests." (*See* Opinion, dated September 6, 2011 ("App. Op."), included in Respondents' Substitute Appendix at A11 (citing Section 375.116 of the Missouri Revised Statutes).) The dismissal of this claim should be affirmed.

Both the trial court and the Court of Appeals also correctly held that Emerson's claim that Marsh breached a duty by failing to disclose it may receive interest on the premiums Emerson transmitted to Marsh and that Marsh held on behalf of Emerson's insurers should be dismissed. Although Emerson's claim is based on Marsh's purported non-disclosure of this practice, Emerson admits in its Petition that Marsh actually disclosed its receipt of interest on premiums. This Court also has made clear that once an insured pays the premium to an insurance producer, the money belongs to the insurer. Thus, if any duty is owed with regard to the premiums Marsh held, that duty flows to the insurers, and Marsh is under no obligation to return earned interest to Emerson, and, in fact, Missouri law prohibits Marsh from doing so. Further, Section 375.05 of the Missouri Revised Statutes establishes that a broker is not required to maintain premiums in a segregated bank account, and it would thus make no sense to suggest that a broker cannot earn interest on such premiums. Finally, Marsh's receipt of interest on premiums, which occurs after procurement of the insurance at issue, could not have violated a fiduciary duty because settled Missouri law makes clear that any such duty ends upon the procurement of the requested insurance. The dismissal of this claim should be affirmed.

The Court of Appeals erred when it held that Emerson's Petition should not be dismissed in its entirety. Emerson argued that the fiduciary duty imposed on an insurance broker under Missouri law includes not only a duty to procure the requested coverage, but to do so at the absolute lowest price. The Court of Appeals reversed the trial court's dismissal of this claim, explaining that "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 [and] this issue may be more appropriately disposed of after discovery by summary judgment." (App. Op. at A13.)

The Court of Appeals holding is contrary to a long line of Missouri cases which expressly limit the scope of a broker's fiduciary duty to exercising reasonable care in the procurement of the requested insurance, and which say nothing about a duty to obtain insurance at a particular price. (L.F. 95 ("No Missouri case cited by Plaintiff or found by this Court has expanded the fiduciary duty owed by an insurance broker beyond the duty to procure or maintain a level of insurance sufficient for the client.").) None of the cases cited by Emerson establishes otherwise. The dismissal of this claim by the trial court should be affirmed.

As set forth above, each of the issues on appeal was fully addressed through application of settled Missouri common law and Missouri statutory law. Nevertheless, in its Opinion, the Court of Appeals also held that "an analysis of the relationship between the parties" was necessary, and then concluded that "a duty of loyalty is inherent in an insurance broker's present fiduciary duties as agent for the insured." (App. Op. at A10, A16.) And because that question "had not been expressly considered by the Supreme Court," the Court of Appeals "order[ed] this case transferred to the Missouri Supreme Court …." (*Id.* at A16.)

Because the existence, or lack thereof, of a duty of loyalty ultimately was of no consequence to the trial court's or the Court of Appeals' holdings, Marsh respectfully submits that there was no need for the Court of Appeals to undertake its analysis and

there is no reason for this Court to conduct a similar analysis now. If the Court decides to do so, however, Marsh submits that the Court of Appeals basically got it right. While the law of agency may impose a duty of loyalty on insurance brokers, years of Missouri precedent and significant policy concerns support the Court of Appeals' decision to limit the scope of that duty to using reasonable skill, care and diligence to procure the requested coverage and to act honestly and loyally when carrying out that duty.

STATEMENT OF FACTS

A. The Parties

Emerson is a "global industrial company," with more than 140,000 employees worldwide, that "designs, manufactures, and sells numerous products" including process control systems, power technologies, and electric motors. (L.F. 18 at ¶ 1.) Emerson first retained Marsh in 1987 to procure various insurance policies, and certain international coverages, and Emerson remains a client of Marsh today. (L.F. 19 at ¶ 8.)

Marsh is an insurance broker that provides brokerage services to clients throughout the United States, including through its office in St. Louis, Missouri. (L.F. 18 at ¶ 2.) Marsh & McLennan Companies, Inc. ("MMC") is a holding company that conducts no insurance brokering business at all, and Marsh Inc. is a subsidiary of MMC and the holding company of Marsh. (L.F. 18 at ¶¶ 3-4.) Defendant Joseph Lampen is a former employee of Marsh (L.F. 18 at ¶ 5), and just one of the many Marsh employees who worked on the Emerson account.

B. Emerson's Petition

In February 2005, Emerson filed a Petition against Defendants in Missouri state court. (L.F. 16.) On March 21, 2005, Defendants removed the case to the United States District Court for the Eastern District of Missouri, and the case then was transferred to a federal Multidistrict Litigation in the District of New Jersey hearing all class action and individual cases related to allegations of allegedly improper "contingent commission" payments to insurance brokers, including Marsh. (L.F. 43-44.) In April 2009, the case was transferred back to the United States District Court for the Eastern District of Missouri and was remanded to the Circuit Court of the City of St. Louis in January 2010. (L.F. 64.)

Emerson's six-page Petition asserted four separate causes of action: Count I – Disgorgement-Restitution, Count II – Civil Conspiracy, Count III – Breach of Fiduciary Duty, and Count IV – Punitive Damages. (L.F. 20-21 at ¶¶ 11-21.) Notably, Emerson *does not* assert that Marsh ever failed to procure any insurance coverage Emerson requested or that any claim Emerson made went unpaid. Instead, Emerson apparently seeks the return of 100% of the fees and commissions Marsh earned based upon Emerson's assertion that Marsh breached a fiduciary duty owed to Emerson by purportedly failing to disclose its receipt of contingent commissions. (L.F. 19-20 at ¶ 9.)

Contingent commissions, like standard commissions, are payments made by insurers to insurance brokers based on the premium paid by an insured. *See In re Ins. Brokerage Antitrust Litig.*, Nos. 04-5184 (FSH), 05-1079 (FSH), 2006 U.S. Dist. LEXIS 73055, at *45 (D.N.J. Oct. 3, 2006), *aff'd in part, rev'd in part on other grounds*, 618

F.3d 300 (3d Cir. 2010). Unlike standard commissions, which are paid on a policy-by-policy basis and as part of the actual procurement of the policy, contingent commissions typically are calculated and paid on a yearly basis, many months or years after the completion of individual insurance transactions, and are based on all or substantially all policies placed by an insurance broker with a particular insurer. *Id.* at *43.

The industry-wide practice of insurers paying contingent commissions to insurance brokers has been a public fact for decades and long-recognized by courts. *See, e.g.*, *Sherman v. Ryan*, 911 N.E.2d 378, 396 (Ill. App. Ct. 2009) (noting that contingent commissions have been disclosed in public broker filings for years); *Rudolph E. Bucci, Inc. v. Greater N.Y. Mut. Ins. Co.*, 330 N.Y.S.2d 426, 426-27 (Sup. Ct. 1972) (as long as three decades ago, "contingency commission agreements between insurance carriers and their [brokers]" were already "commonly known in the insurance industry"). There is no case, statute or regulation in any of the fifty states prohibiting the payment or receipt of contingent commissions and many states, such as Missouri, explicitly recognize the legality of such payments. *See, e.g.,* Mo. Rev. Stat. §§ 375.116 and 379.500 (2005); *People of the State of New York v. Wells Fargo Ins. Servs. Inc.*, 944 N.E.2d 1120, 1121 (N.Y. 2011).

Emerson also claims that Marsh breached a fiduciary duty by retaining interest it may have earned on premium payments made by Emerson and held by Marsh on behalf of Emerson's insurers. (L.F. 20 at ¶ 10.) While Emerson asserts that this common practice occurred "unbeknownst to plaintiff," it also alleges that Marsh disclosed the amounts it earned as "fiduciary interest income" in its public filings. (*Id.*)

C. The Trial Court's Dismissal Of The Petition With Prejudice

Emerson's theory that Marsh's conduct was *a breach of fiduciary duty* was an attempt to cram a square peg into a round hole, as the parties did not sit in a position of unequal bargaining power that traditionally underlies fiduciary duty claims. Emerson is a "global industrial company." (L.F. 18 at ¶ 1.) Marsh is alleged to be "the largest provider of insurance brokerage services in the world." (L.F. 19 at ¶ 7.) These two commercial entities entered into an arms-length agreement for services. (L.F. 19 at ¶ 8.) A client's traditional cause of action against an entity that failed in the performance of such an agreement is for breach of contract. In addition, Emerson's contention that Marsh received "unlawful kickbacks" pursuant to secret agreements may sound in fraud, if anything, not fiduciary duty. (L.F. 19-20 at ¶¶ 9, 14.)

But Emerson did not allege breach of contract or fraud presumably because those counts would have required it to allege and ultimately prove actual damages proximately caused by Marsh's actions, which Emerson either does not want to do or cannot do. And Emerson's scant six-page Petition, with its vague and conclusory allegations of kickbacks and conspiracies, would not have met the requirement that averments of fraud be stated with particularity. *See* Mo. R. Civ. P. 55.15. Instead, as Count I of its Petition made clear, Emerson seeks only "restitution" of all fees and commissions paid to Marsh over a two decade period, without having to prove fraud, breach of contract, causation, or actual damages with respect to any one of the hundreds of policies brokered by Marsh over that period.

Numerous decisions establish, however, that Missouri common law provides no such cause of action in these circumstances. As a result, on June 2, 2010, pursuant to Missouri Supreme Court Rules 55.27(a)(6) and 55.27(b), Defendants filed a motion for judgment on the pleadings. (L.F. 32.)

On October 26, 2010 the trial court dismissed all remaining counts[1] in Emerson's Petition against all Defendants, with prejudice, finding that restitution-disgorgement and punitive damages were remedies and not claims. Importantly, the Court found no basis under Missouri law to impose on insurance brokers the type of general fiduciary duty proposed by Emerson. (L.F. 99.) As the trial court explained,

> [n]o Missouri case cited by Plaintiff or found by this Court has expanded the fiduciary duty owed by an insurance broker beyond the duty to procure or maintain a level of insurance sufficient for the client. It is not the place of the Court to impress a fiduciary duty upon an insurance broker, above and beyond that which currently exists.

(L.F. 95.) On that basis, the trial court held that Emerson's allegations that it may have paid inflated prices for its insurance because Marsh earned contingent commissions and interest income did not amount to a claim for breach of fiduciary duty as a matter of Missouri law. (L.F. 98.)

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[1] On July 21, 2010, immediately following oral argument on the motion, Emerson's count for civil conspiracy was dismissed. (L.F. 87.)

D. Emerson's Appeal To The Court Of Appeals

Emerson appealed the trial court's decision to the Court of Appeals, seeking reversal of the dismissal of only the breach of fiduciary duty claim, and against only a single defendant, Marsh USA Inc. Emerson also changed tactics on appeal. Rather than arguing that the trial court incorrectly held that the fiduciary duty imposed on an insurance broker under Missouri law was limited, Emerson argued that Marsh's "status as an agent" for Emerson carries with it not only a fiduciary duty, but the "duty of loyalty." (Appellant's Substitute Brief ("Subst. Br.") at 8, 10.) Then, relying primarily on a handful of treatises, such as *Scott & Ascher On Trusts* and *The Law of Trusts and Trustees,* Emerson argued that commercial insurance broker Marsh breached the duty of loyalty by (i) receiving contingent commissions, (ii) receiving interest on the premiums it received from Emerson on behalf of Emerson's insurers, and, alternatively, (iii) not obtaining insurance at the absolute lowest price. (Subst. Br. at 8-9.)

E. The Court Of Appeals' Opinion

The Court of Appeals issued its Opinion on September 6, 2011, affirming the trial court's dismissal of the two basic claims in Emerson's Petition. The Court of Appeals' analysis with respect to both claims was consistent with a long line of Missouri cases limiting the duty owed by an insurance broker to using reasonable skill, care and diligence to obtain the insurance coverage requested by the insured.

First, the Court of Appeals held that Marsh's receipt of contingent commissions and alleged failure to disclose them to Emerson did *not* breach any duty Marsh owed to Emerson. Instead, relying on Section 375.116 of the Missouri Revised Statutes, the

Court of Appeals found that "our legislature … specifically allows insurance brokers to receive contingent commissions" and "has specifically chosen not to require insurance brokers to disclose this practice to their clients, implying this practice is not against clients' interests." (App. Op. at A11.)

Second, the Court of Appeals also upheld the dismissal of Emerson's claim that Marsh breached a duty to Emerson by failing to disclose that Marsh may earn interest on the premiums it received from Emerson and holds for Emerson's insurers. Relying on Section 375.051 of the Missouri Revised Statutes, the Court of Appeals agreed with the trial's court's determination that, because a broker is not required to maintain premiums in a segregated bank account, it would make no sense to suggest that a broker cannot earn interest on such premiums. (*See id.* at A16.) Additionally, the Court of Appeals held that Marsh's receipt of interest on premiums, which occurred after procurement of the insurance at issue, could not have violated a fiduciary duty of loyalty because Marsh "had no fiduciary duty beyond procuring insurance …." (*Id.* at A15-A16.)

While the Court of Appeals affirmed the dismissal of Emerson's primary claims, it partially reversed the trial court's complete dismissal of the Petition. As the Court of Appeals explained, "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." (*Id* at A13.) Instead, the Court of Appeals noted that "this issue may be more appropriately disposed of after discovery by summary judgment." (*Id.*)

Finally, while it was unnecessary to do so given its other holdings, the Court of Appeals also undertook an analysis of an issue the trial court did not have to consider because it was not raised by Emerson in opposition to the original motion – *i.e.*, whether the relationship between an insurance broker and an insured includes a duty of loyalty broader than a duty to use skill, care and diligence in procuring the requested coverage. (*Id.* at A4-A10.) The Court of Appeals found that insurance brokers, such as Marsh, are agents of their clients and thus owe a limited fiduciary duty. The court then applied general agency principles derived from the *Restatement of Agency* to find that, "by definition, the concept of an agent's fiduciary duty encompasses a duty of loyalty automatically." (*Id.* at A6, A8-A9.)

Though the Court of Appeals imposed a duty of loyalty, as noted above it also significantly and correctly limited the scope of that duty in a manner consistent with numerous prior cases exploring the scope of the duty an insurance broker in Missouri owes to the insured. The Court of Appeals also decided that whether a duty of loyalty exists at all should be determined by this Court:

> 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.

(*Id.* at A16.)

ARGUMENT

I. The Court Of Appeals And The Trial Court Correctly Determined That Marsh Did Not Breach Any Duty It Owed To Emerson By Receiving Contingent Commissions Or Earning Interest On Premiums.

[Response To Appellant's Points Relied On I And III.]

Emerson does not assert that Marsh ever failed to procure insurance coverage Emerson requested or that any claim Emerson made went unpaid, and Marsh thus cannot have violated an insurance broker's well-established and limited duty to use reasonable skill, care and diligence to procure the coverage requested by the insured. Instead, since the inception of this case more than six years ago, Emerson's claims against Marsh have boiled down to two fundamental allegations. First, Emerson claims that Marsh breached a duty by purportedly failing to disclose its receipt of contingent commissions. (L.F. 19-20 at ¶ 9.) Second, Emerson claims Marsh breached a duty by retaining interest it may have earned on premium payments made by Emerson and held by Marsh on behalf of Emerson's insurers. (L.F. 20 at ¶ 10.) The trial court correctly dismissed these claims, and the Court of Appeals correctly affirmed the dismissal.

A. The Receipt Of Contingent Commissions, Even If Undisclosed, Is Expressly Permitted By Missouri Law And Thus Cannot Violate Any Common Law Duty An Insurance Broker May Owe To An Insured.

[Response To Appellant's Points Relied On I.]

Emerson asserts that the trial court's dismissal of its Petition should be reversed because Marsh's receipt of contingent commissions breached its duty of loyalty to

Emerson and, regardless of whether Emerson was damaged in any way, Marsh must "disgorge" all fees and commissions it earned as Emerson's insurance broker. (L.F. 20 at ¶¶ 11-12.) The Court of Appeals disagreed, and denied Emerson's appeal in this regard.

As the Court of Appeals explained, the Missouri "state legislature … acknowledged in Section 375.116 that the practice of insurance companies paying contingent commissions to brokers is lawful [and that] our state legislature has specifically chosen not to require insurance brokers to disclose this practice …."[2] (App. Op. at A10-A11 ("our legislature in Section 375.116 … specifically allows insurance brokers to receive contingent commissions").) The Court of Appeals thus held that Marsh's receipt of contingent commissions did not breach any duty owed to Emerson (*see id.* at A11), and Emerson's arguments to the contrary are without merit.

Emerson argues that Section 375.116 "regulates the relationship between insurance companies and brokers, not relations between brokers and insureds" and that a broker may retain contingent commissions only "if it (1) makes full disclosure to the

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[2] Section 375.116 of the Missouri Revised Statutes states, in relevant part, that "[a]n 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* [and] [n]othing in this chapter shall abridge or restrict the freedom of contract … with reference to the amount of commissions or fees to be paid to such brokers *and such payments are expressly authorized*." Mo. Rev. Stat. §375.116 (2002) (emphasis added).

insured; and (2) obtains the insured's consent." (Subst. Br. at 14-15.) Emerson's argument is illogical and inconsistent with canons of statutory interpretation.

As the Court of Appeals held, and Emerson concedes, the Missouri Legislature specifically has authorized an insurance companies payment of contingent commissions to an insurance broker. (App. Op. at A11; Subst. Br. at 14.) The Legislature's authorization of such payments would be rendered meaningless if it was subject to the approval of each of the thousands of insureds a broker like Marsh deals with in the course of a given year. Moreover, to the extent the Legislature believed a broker's right to contract with an insurer to receive commissions should be subject to disclosure and consent by the insured, it could have included such requirements in Section 375.116 – but it chose not to. Emerson's effort to abrogate the Legislature's intent in enacting Section 375.116 should be denied. *See, e.g., Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 902 (Mo. 2007) ("The words in a statute are presumed to have meaning, and any interpretation rendering statutory language superfluous is not favored.") *abrogated on other grounds by* Mo. Rev. Stat. 287.230 (2008); *Pitts v. Williams*, 315 S.W.3d 755, 762 (Mo. App. 2010) ("[W]e avoid interpretations of statutes that lead to unreasonable or absurd result[s].").

Next, in an attempt to avoid Section 375.116 altogether, Emerson argues that "[n]othing in § 375.116 purports to alter … common law rules" relating to an agent's duty of disclosure, and "[u]nder Missouri law, "statutes displacing common law remedies are to be strictly construed …." (Subst. Br. at 15.) Emerson's argument again misses the mark, and the cases it cites in support are inapposite.

In *Overcast v. Billings Mut. Ins. Co.,* 11 S.W.3d 62, 69 (Mo. 2000), where plaintiff brought a defamation claim relating to a refusal to pay on an insurance policy, this Court held that a statute providing certain remedies for bad faith denial of an insurance claim did not provide the exclusive *remedy* for the misconduct. Similarly, in *Wince v. McGarrah,* 972 S.W.2d 641, 643 (Mo. App. 1998), the Court of Appeals held that a remedy provided by statute for failure to file a satisfaction of judgment did not displace remedies potentially available at common law.

Both cases, therefore, dealt with whether a remedy provided by statute was the sole remedy available for conduct prohibited both by statute and the common law. That simply is not the case here. Section 375.116 does not prohibit certain conduct or provide a "remedy" for a violation of the statute. Instead, it specifically authorizes the payment of commissions to insurance brokers. It is not the case, therefore, that both a statute and the common law prohibit an insurance broker's receipt of contingent commissions and the only question is whether the statutory remedy is the sole remedy for conduct that violates that prohibition. *Overcast* and *Wince* are inapposite.

Moreover, the rule relied on in *Overcast* and *Wince* applies only when the common law and statute do not conflict. In cases where a statute directly contradicts a common law rule, however, the statutory rule the common law:

> No act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly,

> or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.

Mo. Rev. Stat. § 1.010 (1957). The Missouri Legislature expressly authorized an insurance broker's receipt of contingent commissions and "has specifically chosen not to require insurance brokers to disclose this practice." (*See* App. Op. at A11.) Thus, Section 375.116 is directly in conflict with and trumps any common law requirement prohibiting such payments or requiring the disclosure of such payments.

Finally, Emerson's argument also is contrary to Missouri law. While Emerson concedes that Section 375.116 "declares that insurance companies may lawfully pay commissions to brokers," Emerson asserts that, unless insureds agree otherwise, such commissions must be handed over to the insureds. (Subst. Br. at 14-16.) The Missouri Legislature, however, prohibits such a transfer of commissions from insurance broker to insureds, a practice referred to as rebating. *See, e.g.*, Mo. Rev. Stat. § 375.936 (2002) (defining "Rebates" as an "unfair trade practice" prohibited by Missouri law).

B. The Receipt Of Interest On Premiums, Which Marsh Disclosed, Did Not Violate Any Duty Marsh Owed to Emerson.

[Response To Appellant's Points Relied On III.]

Emerson alleges that it made premium payments to Marsh, rather than directly to its insurers and that, "[u]nbeknownst to plaintiff," Marsh earned interest on those premiums before remitting them to Emerson's insurers. (L.F. 20 at ¶ 10.) The interest income earned by Marsh on such premiums was no secret: Emerson itself concedes in its Petition that Marsh disclosed this fact in public filings. (*Id.*) Because the alleged

nondisclosure of this practice is the basis for Emerson's breach of the duty of loyalty claim (Subst. Br. at 8), Emerson's admission is fatal, and the trial court correctly dismissed this claim.[3]

Even if Marsh had not disclosed it may have been earning interest on the premiums Emerson paid to its insurers through Marsh, Emerson's claim still would fail as a matter of law because premiums held by brokers for transmission to insurers are held on behalf of the insurers, not the insured. It is established as a matter of Missouri statutory and case law that once received by the insurance broker the premium belongs to the insurance company, and the broker holds the premium *for the benefit of the insurer, not the benefit of the insured.* For example, Missouri Revised Statute Section 375.051 (1) (2002) states, in pertinent part:

> Any insurance producer . . . who shall receive or collect moneys from any source or on any account whatsoever, on behalf of any insurance company doing business in this state, shall be held responsible in a trust or fiduciary capacity to the *company for any money so collected or received by him or her for the insurance company.*

(emphasis added).

This Court also has made clear that once an insured pays the premium to an insurance producer, the money belongs to the insurer. *Graue v. Mo. Prop. Ins. Placement*

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[3] The Court of Appeals did not address this specific argument in its Opinion. (*See* App. Op. at A14-A16.)

Facility, 847 S.W.2d 779, 784 (Mo. 1993) ("When premiums are collected, an insurance agent does not take the money as his or her own, but receives the money as a fiduciary of the insurer."). *See also Monia v. Melahn*, 876 S.W.2d 709, 713 (Mo. App. 1994) ("As an agent of [the insurer], Tammy held the money paid for the premium in trust for [the insurer] once she submitted an application for [the insured's] insurance with them.").[4] Thus, if any duty is owed with regard to the premiums Marsh held, that duty flows to the insurers, and Marsh is under no obligation to return earned interest to Emerson.

Section 375.051 also supports the proposition that insurance brokers do not hold premiums as fiduciaries for the insured. Section 375.051 recognizes an insurance broker's right to deposit premiums into the broker's bank accounts and does not require that the broker maintain separate bank accounts for the funds received from each separate insured, so long as funds so held are "reasonably ascertainable from the books of account and records" of the producer. Mo. Rev. Stat. § 375.051 (3) (2002). Thus, the statute permits an insurance broker to deposit premiums received from multiple insureds into a single bank account before those premiums are passed on to the insurers and, as with most bank accounts and as disclosed by Marsh's parent company in its public filings

[4] The Court of Appeals held that these cases were inapposite because they dealt with an insurance broker acting as agent of the insurer. (*See* App. Op. at A14.) We respectfully disagree – a fair reading of each case is that the insurance brokers in those cases were not insurers' agents and were instead acting as independent insurance producers akin to Marsh here.

(L.F. 20 ¶ 10), interest is earned. Both the trial court (L.F. 98) and the Court of Appeals (App. Op. at A16) relied on this ground in determining that Marsh's potential receipt of interest on the premiums received from Emerson for transmission to its insurers did not violate any duty owed to Emerson– fiduciary duty, duty of loyalty, or otherwise.

Unable to cite any authority suggesting, let alone establishing, that an insurance broker holds premiums as a fiduciary for the insured under the circumstances in this case, Emerson again seeks to rely on general agency principles that do not apply here. Specifically, Emerson argues that,

> 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.

(Subst. Br. at 20-21 (emphasis added), citing *Restatement (Second) of Agency* § 388, cmt. a. (1958), Subst. Br. Appendix A16.)[5] Emerson faces the same problems with this argument.

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[5] In an apparent attempt to bolster the credibility of relying solely on the *Restatement of Agency* as authority for this argument, Emerson notes that Section 388 was applied by this Court in *Missouri Highway & Transp. Comm'n v. Sample*, 702 S.W.2d 535 (Mo. App. 1985) (*see* Subst. Br. at 11-13). While Section 388 was indeed cited, *Sample* is inapposite to Emerson's premium interest argument. First, breach of

First, Emerson admits in its Petition that Marsh *disclosed* the amounts it earned as "fiduciary interest income" in its public filings. (L.F. 20 at ¶ 10 ("In defendants' 2003 Annual Report, it referred to this revenue item as 'fiduciary interest income.").) Thus, as noted above, a claim by Emerson based on non-disclosure – even one purportedly based on the *Restatement (Second) of Agency*, § 388 – is deficient on its face.

Second, as explained above, Marsh was not Emerson's agent for the purposes of premium payments. Once Emerson paid its premiums to the insurers through Marsh, Marsh held the premiums as agent of the insurers, not Emerson.

Third, even if Marsh was Emerson's agent for purposes of holding premiums, the *Restatement of Agency* specifically exempts Marsh's conduct from the requirement that agents return profits from third parties to principals. Section 403 of the *Restatement (Second) of Agency* states that, "[i]f an agent receives anything as a result of his violation of a duty of loyalty to a principal, he is subject to a liability to deliver it, its value, or its

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fiduciary duty is not one of the claims asserted by the plaintiff in *Sample*, and the issue is not discussed in the opinion. Second, in *Sample*, plaintiff (a state commission) sued its employee Sample for accepting kickbacks in exchange for inducing the commission to hire Crain, an appraiser who "both defendants knew… was not qualified." *Id.* at 536. The secret fees allegedly earned by the defendant involved the plaintiff incurring a cost – an unqualified appraiser. In the instant case, Emerson does not allege that it bore any cost in connection with Marsh earning interest on its premiums prior to their remittance to the insurers.

proceeds to the principal." However, Comment e to that section specifies that, where an agent receives something of value as a result of violating a duty of loyalty to a principal "where [there is] no breach of fiduciary duty," the rule does not apply. *Restatement (Second) of Agency* § 403 cmt. e (1958). Because Marsh's retention of earned interest is not a breach of the duty of loyalty as a matter of law, the Comment e exemption applies, and "[Emerson] is not entitled to the profits so received." *Id.*

Emerson's reliance on Section 388's third illustration is also misplaced. (*See* Subst. Br. at 21.) There, an agent who received a rebate of premiums *from* the insurer to be paid *to* the insured was bound to credit the rebate to the insured. (*Id.*) In that case, the insurer paid the insured through the broker and, therefore, the money was held for the insured. Here, it is the opposite. And, of course, the illustration presumes that the premium rebate is undisclosed to the principal, which was not the case here, as Marsh disclosed its earnings on premium interest. (*See* L.F. 20 at ¶ 10.)

As with its other theories, Emerson fails to cite a single case where an insurance broker or agent was found to have breached a duty of loyalty by retaining interest on premium payments by an insured to an insurer. In fact, beyond the conclusory statement that "[t]he petition clearly states a cause of action for breach of fiduciary duty in retaining interest on premiums paid to Marsh" (Subst. Br. at 22), Emerson does not even argue that Marsh's retention of interest on the premiums violated a duty of loyalty, and Emerson makes no effort to connect interest income to the duty to procure.

II. The Trial Court's Dismissal Of Emerson's Alternative Claim That Marsh Had And Breached A Duty To Obtain "Best Terms" Also Should Be Affirmed.

[Response To Appellant's Points Relied On II.]

Hedging its bets, Emerson also argues that even if Marsh's fiduciary duty as an insurance broker is limited to using reasonable skill, care and diligence in procuring the coverage Emerson requested, and does not include a duty of loyalty, then the trial court still erred in dismissing Emerson's Petition in its entirety. (Subst. Br. at 16 ("Even if the trial court got the law right . . . it misapplied it.").) Specifically, Emerson argued, for the first time on appeal, that the fiduciary duty imposed on an insurance broker under Missouri law includes not only a duty to procure the requested coverage, but to do so at the absolute lowest price. (*Id.*) Emerson alternately argues that Marsh was required to recommend coverage at the lowest price because Emerson requested as much. (*Id.*)

The Court of Appeals did not analyze this claim under the rubric of the "duty of loyalty." Instead, the Court of Appeals held that "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." (App. Op. at A13 (emphasis added).) Marsh respectfully submits that the Court or Appeals was incorrect, and that Emerson's alternative theory does not state a claim under the limited fiduciary duty imposed on insurance brokers in Missouri.

Emerson's alternative theory is an effort to turn a run-of-the-mill contract dispute over pricing into fiduciary duty claims. Point II of Emerson's Substitute Brief focuses on Emerson's contention that it supposedly paid inflated premiums, notwithstanding that it hired Marsh "to recommend insurance policies that met the plaintiff's needs at the lowest possible price." (L.F. 19 at ¶ 8.) That is, Emerson asserts that it had an agreement with Marsh relating to the terms of the insurance Marsh was hired to procure. A breach of such an agreement between commercial entities establishes a classic case of breach of contract. Nevertheless, Emerson eschewed a potentially cognizable contract claim in favor of a breach of fiduciary duty claim. Missouri courts disfavor such tactics and generally prohibit the assertion of tort claims seeking solely economic damages. *See, e.g.*, *Crowder v. Vandendale,* 564 S.W.2d 879 (Mo. 1978); *Wilbur Waggoner Equip. and Excavating v. Clark Equip. Co., 668 S.W.2d 601, 603* (Mo. App. 1984). Emerson's alternative theory of recovery should be dismissed for this reason alone.

Nor is there any support for Emerson's assertion that failure to procure the requested insurance at the absolute lowest price establishes a breach of the limited fiduciary duty imposed on insurance brokers under Missouri law. Indeed, Marsh has been unable to locate any authority to support this bald statement, and Emerson itself does not point to a single case to support its argument that failure to obtain insurance "at the lowest possible price" constitutes a failure to procure insurance, let alone a breach of fiduciary duty. Emerson simply claims – without citation to a single authority – that, "under Missouri law, the broker has a fiduciary obligation to obtain the lowest cost insurance reasonably available even without a specific instruction." (Subst. Br. at 17.)

To the contrary, the decisions of this Court and all others that have considered the proper scope of the fiduciary duty owed by an insurance broker establish that this is not, and should not be, the law in Missouri. Long-established Missouri precedent addressing the scope of a broker's fiduciary duty expressly limits a broker's duties to exercising reasonable care in procurement, and says nothing of a duty to obtain insurance at a particular price. (L.F. 95 ("No Missouri case cited by Plaintiff or found by this Court has expanded the fiduciary duty owed by an insurance broker beyond the duty to procure or maintain a level of insurance sufficient for the client.")); *see also Roth v. Equitable Life Assurance Soc'y of the U.S.*, 210 S.W.3d 253, 261 (Mo. App. 2006); *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 394-95 (Mo. App. 1998); *Farmers Ins. Co. v. McCarthy*, 871 S.W.2d 82, 85 n.2 (Mo. App. 1994).

The only two cases that Emerson cites in support of its argument wholly miss the mark. Emerson relies on *Euclid Plaza Associates, L.LC. v. African American Law Firm, L.L.C.*, 55 S.W.3d 446, 449 (Mo. App. 2001), and *Jarnagin v. Terry*, 807 S.W.2d 190, 194 (Mo. App. 1991), ostensibly to support its argument that Marsh's failure to "follow Emerson's instructions" to recommend insurance at the lowest possible price was a breach of the fiduciary duty to use reasonable skill, care and diligence to procure the requested coverage. (Subst. Br. at 17.) But neither of those cases dealt with insurance brokers, or even alleged breaches of fiduciary duty.

In *Euclid*, a landlord-tenant case, the issue was whether the prior owner of a building was the agent of the new owner. Emerson selectively quotes portions of the court's recitation of elements of agency law that have nothing to do with an insurance

broker's limited fiduciary duty. *Compare Euclid*, 55 S.W.3d at 449, *with* Subst. Br. at 17. In *Jarnagin*, an attorney-client case that Emerson cites for the proposition that "[a]n agent is bound to obey the specific instructions of the principal," the instructions at issue were those given by the client to her attorney in connection with the distribution of marital assets in a divorce proceeding. *Compare Jarnagin*, 807 S.W.2d at 194, *with* Subst. Br. at 17. There, the court held that the broken promise of the attorney (unquestionably a *general* fiduciary) to follow the client's specific instructions did not sound in tort but, rather, supported a claim for breach of contract. *Jarnagin,* 807 S.W.2d at 191. Thus, to the extent *Jarnagin* is remotely applicable here, it does not support Emerson's contention that the failure to follow an instruction is a breach of fiduciary duty but, rather, supports the notion that Emerson chose to assert the wrong claim.

In support of its contention that the trial court was "flat wrong" in holding that "[n]o Missouri Court" imposes a fiduciary duty to obtain the lowest cost insurance even without instruction,[6] Emerson relies on the 1965 case of *Zeff Distributing Co. v. Aetna Casualty & Surety Co.*, for the proposition that "an insurance broker . . . is under a duty to exercise good faith and reasonable diligence to procure the insurance on the **best**

[6] In fact, the trial court did not hold that no Missouri court imposes a fiduciary duty to obtain the lowest price insurance even without instruction as Emerson's Substitute Brief suggests, because Emerson never made this argument below. The trial court did, however, find that a broker owes no fiduciary duty beyond the duty to use reasonable skill, care and diligence to procure the requested insurance. (L.F. 95.)

terms he can obtain." (Subst. Br. at 18 (quoting *Zeff Distrib. Co. v. Aetna Cas. & Surety Co.*, 389 S.W.2d 789, 795 (Mo. 1965) (emphasis in Substitute Brief)).) But the trial court was not wrong. *Zeff*, which is not a fiduciary duty case, does not impose any greater duty on Marsh than the narrow fiduciary duty generally applied to insurance brokers in Missouri for at least three reasons.

First, the language about "best terms" on which Emerson so heavily relies is dicta. *Zeff* is simply a case about an insurance broker's failure to procure coverage for its client, and has nothing to do with obtaining "the lowest possible price" or "the best terms [the broker] can obtain." *Compare Zeff*, 389 S.W.2d at 795 (assessing broker's alleged failure to procure replacement theft coverage upon cancellation of interim policy and not discussing price or other terms), *with* Subst. Br. at 18 (relying on *Zeff* to claim an insurance broker duty to obtain coverage at lowest possible price).

Second, *Zeff* is factually distinguishable because the broker in *Zeff* undertook far more controlling responsibilities than Marsh is alleged to have undertaken here. *Zeff*, 389 S.W.2d at 793. Whereas Emerson alleges that it paid Marsh to "recommend insurance policies that met the plaintiff's needs," as is typical of the commercial insurance broker-client relationship, the broker in *Zeff* was granted the authority to actually purchase the insurance that he deemed appropriate for the client. *Compare* L.F. 19 at ¶ 8, *with Zeff*, 389 S.W.2d at 793. Indeed, the plaintiff insured in *Zeff* would only learn of changes to its insurance policy or carrier after a new policy had been issued. *Zeff*, 389 S.W.2d at 793. In that unique context, this Court noted that:

> An insurance broker, *particularly one… who undertakes to keep the property insured from year to year*, is under a duty to exercise good faith and reasonable diligence to procure the insurance on the best terms he can obtain; and in this connection proper diligence requires him to canvass the market and have adequate knowledge as to the different companies and terms available.

Id. at 795 (citations omitted) (emphasis added). Emerson conveniently omitted the italicized language when it quoted this portion of the opinion. (Subst. Br. at 18.)

Third, even if this Court in *Zeff* held that an insurance broker has "a duty to exercise good faith and reasonable diligence to procure the insurance on the best terms he can obtain," there is a world of difference between that duty and Emerson's theory that a broker "owe[s] a fiduciary duty to obtain the lowest cost insurance." (Subst. Br. at 18.) When a broker is asked to obtain best terms, that may mean the broadest coverage, the lowest deductible, the best coverage against catastrophic losses, *or* it may mean the lowest possible price. Reducing an insurance broker's duty to an absolute requirement to get insurance at the lowest price regardless of the other terms of the policy, the financial stability of the insurer, or other considerations, would remove "reasonable care, skill and diligence" from the equation entirely. And saying that failure to obtain the lowest price,

regardless of circumstances, constitutes a breach of fiduciary duty, would widen the scope of a broker's duty beyond anything Missouri law has ever allowed.[7]

The Court of Appeals did not agree with these arguments, and partially reversed the trial court's dismissal of the Petition, finding that this alternative claim was sufficiently pleaded. (App. Op. at A13-A14.) The Court of Appeals explained that it was "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 [and that] this issue may be more appropriately disposed of after discovery by summary judgment." (*Id.* at A13.)

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[7] Nor is such an absolute duty imposed on insurance brokers in other states. For example, in Alaska, where insurance brokers operate under a similar duty to "to exercise reasonable care, skill and diligence in procuring insurance," the Alaska Supreme Court found that this duty "does not mean that an agent has an absolute duty to obtain the lowest possible rates." *Eagle Air, Inc. v. Corroon & Black/Dawson & Co. of Alaska, Inc.*, 648 P.2d 1000, 1006 (Alaska 1982). *See also Tunison v. Tillman Ins. Agency*, 362 S.E.2d 507, 509 (Ga. Ct. App. 1987) ("The duty of an insurance agent to procure the represented coverage does not create a duty to obtain coverage at any particular rate."); *Droitcour Co. v. United Mgmt. Corp.*, No. 99-6117, 2004 R.I. Super. LEXIS 184, at *15 (Super. Ct. Oct. 15, 2004) ("neither an insurance broker nor insurer owe a duty to their insured customer to provide the lowest rates").

For the reasons discussed above, we respectfully disagree with the Court of Appeals' decision on this issue. However, we do agree that any such "breach of fiduciary duty claim" that survives must satisfy the elements made clear in the Court of Appeals' Opinion: Emerson must establish it gave Marsh "specific instructions" to get the cheapest price possible; and Emerson must establish that Marsh failed to follow those instructions because insurance equivalent to the insurance Emerson obtained was available for a lower price from another suitable insurer. (*See* App. Op. at A12-A13.) If Emerson establishes those elements through admissible evidence, it may be entitled to recoup the difference in cost between what it paid and the lower price it could have paid. (*See id.* at 13-14.) Thus, Marsh respectfully requests that if the Court decides to address this claim and, like the Court of Appeals, remand it for further proceedings, that it too make these requirements clear.

III. The Supreme Court Should Hold, Consistent With All Prior Decisions From Missouri Courts, That An Insurance Broker's Duty Is Limited To Using Reasonable Skill, Care And Diligence To Procure The Coverage Requested By The Insured.

[Further Response To Appellant's Points Relied On I and III.]

Relying on well-settled Missouri law, the trial court dismissed the three claims Emerson asserts against Marsh. (L.F. 95 ("No Missouri case cited by Plaintiff or found by this Court has expanded the fiduciary duty owed by an insurance broker beyond the duty to procure or maintain a level of insurance sufficient for the client. It is not the place of the Court to impress a fiduciary duty upon an insurance broker beyond that

which currently exists.").) The Court of Appeals also considered Emerson's claims under settled Missouri law, and affirmed the dismissal of two of the claims because the practices at issue are permitted under Missouri statutory law and reversed the dismissal of the third claim because the court could not determine, at the pleading stage, whether the claim fell within the insurance broker's well-established duty to use reasonable skill, care and diligence to procure the coverage requested by the insured. (App. Op. at A11-A16.) That is, the decision of both the trial court and Court of Appeals rested on existing, settled Missouri law.

The Court of Appeals nevertheless undertook an "analysis of the relationship between the parties" and the question of whether that relationship includes a duty of loyalty …." (App. Op. at A4.) Because, as it turned out, the existence or lack thereof of such a duty was of no consequence to the trial court's or the Court of Appeals' holdings, Marsh respectfully submits that there was no need for the Court of Appeals to undertake that analysis or to address the question and there is no reason for this Court to do so now. Because the Court of Appeals noted that "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] ordered this case transferred to the Missouri Supreme Court" (*id.* at A16), however, we address that issue below.

The question faced by the Court of Appeals, and now this Court, is whether, as a matter of policy, courts in Missouri should, contrary to years of case law to the contrary, impose an expanded fiduciary duty of loyalty on insurance brokers. *See Farmers Ins. Co. v. McCarthy*, 871 S.W.2d 82, 85 (Mo. App. 1994) ("[A] question of duty presents an

issue of law and when a court resolves a question of duty it is essentially making a policy determination."). *See also Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 432 (Mo. 1985) ("[t]he judicial determination of the existence of a duty rests on sound public policy as derived from a calculus of factors").

In answering that question, the Court of Appeals' analysis was essentially syllogistic. After noting that Marsh and other insurance brokers have an agent-principal relationship with the insured, the court held that "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 even in that limited scope." (App. Op. at A6.) Then, relying on a statement from the *Restatement (Second) of Agency* that, "[u]nless 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," the Court of Appeals held that "in the limited context of an insurance broker's fiduciary duty to a client, a duty of loyalty attaches." (*Id.* at A6-A7.)

The Court of Appeals, however, also recognized the significant precedent from Missouri courts establishing the limited duty an insurance broker owes to an insured under Missouri law, and limited the scope of the duty of loyalty as well. For example, the Court of Appeals noted that the duty owed by an insurance broker is to "act with reasonable care, skill, and diligence" to obtain the requested insurance coverage, and that the scope of that duty "is limited and ends upon procurement of the requested insurance." (App. Op. at A4.) The Court of Appeals pointed out that Missouri 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" (*Id.*), and held that the duty of loyalty does not trump rights that brokers have under statutory law.

As a result, while the Court of Appeals held that "the duty of loyalty is inherent" in the agency relationship between insurance broker and insured, the Court of Appeals also held that the duty of loyalty applies only within the "limited context of an insurance broker's fiduciary duty to a client …." (*Id.* at A4, A10.) The Court of Appeals then held that the duty of loyalty owed by an insurance broker does not trump Missouri statutory law. For numerous reasons discussed below, we submit that, while the agency relationship between insured and broker may give rise to a fiduciary duty and duty of loyalty, the Court of Appeals correctly adhered to years of precedent by limiting that duty to using reasonable skill, care and diligence to procure the requested insurance and to do so "loyally and honestly." (*Id.* at A7.)

First, imposing any broader duty on insurance brokers cannot be squared with the long line of Missouri cases holding that an insurance broker's duty, fiduciary or otherwise, is limited to using reasonable skill, care and diligence to procure the requested coverage – no more, and no less. *See*, *e.g.*, *Roth v. Equitable Life Assurance Soc'y of the U.S.*, 210 S.W.3d 253, 261 (Mo. App. 2006) (insurance broker "discharged his fiduciary obligations properly" by obtaining requested coverage (citation omitted)); *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 394-95 (Mo. App. 1998) (same); *Farmers Ins. Co. v. McCarthy*, 871 S.W.2d 82, 85 n.2 (Mo. App. 1994) ("[T]he duty imposed on insurance agents in Missouri is limited to the exercise of due care in procuring coverages requested by their customers."). *See also Manzella v. Gilbert-Magill Co.*, 965 S.W.2d

221, 228 (Mo. App. 1998) (rejecting broker negligence claim and arguments that a broker's duty should be expanded beyond exercise in due care in procuring coverage, finding "no Missouri cases have adopted the expanded agency agreement concept.").[8]

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[8] While the Court of Appeals correctly noted that "[o]ther state Courts that have considered whether an insurance broker customarily owes a duty of loyalty differ in their conclusions" (App. Op. at A8), the court's statement does not tell the whole story. Although a search of case law around the country shows that less than a handful of courts have imposed a duty of loyalty on insurance brokers based on their status as an agent, the majority of courts that have considered the issue either have refused to do so or to impose any fiduciary duty at all. *See Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.,* 65 A.D.3d 865 (N.Y. App. Div. 2009); *CBC Fin., Inc. v. Apex Ins. Managers*, LLC., 291 F. App'x. 30 (9th Cir. 2008); *J. Smith Lanier & Co. v. Acceptance Indem. Ins. Co*. 612 S.E.2d 843 (Ga. Ct. App. 2005), *rev'd on other grounds*, 630 S.E.2d 404 (Ga. 2006); *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666 (Tex. 1992); *Sempra Energy v. Marsh USA Inc.*, 390 F. App'x. 754 (9th Cir. 2010), ECF No. 77 (dismissing claim against broker for breach of fiduciary duty); *Workman's Auto Ins. Co. v. Guy Carpenter & Co.*, Nos. B211660, B213853, 2011 WL 1663068 (Cal. App. 2 Dist., May 4, 2011); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611 (Del. Ch. 2005). *See also Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58 (Ky. 2010) (noting in a case regarding assignment of claims against an insurance broker that brokers, unlike other fiduciaries, are not burdened by duties of loyalty akin to that of other agents).

Second, creating new and expansive common law duties is unwarranted where the parties' relationship is already governed by extensive state regulation. *See Farmers Ins. Co. v. McCarthy*, 871 S.W.2d 82, 86 (Mo. App. 1994) ("Given the … pervasive scope of legislative activity in this area, … it [is] inappropriate to impose additional requirements by judicial fiat."). That is precisely the case here. The Missouri Legislature has enacted statutes that, *inter alia,*: establish the requirements to become a licensed insurance broker and set forth the types of compensation an insurance broker may, and may not, receive (Mo. Rev. Stat. §§ 375.014, 375.116, 375.076, 375.900); and prohibit unfair practices in the conduct of the business of insurance and define what constitutes an unfair practice (Mo. Rev. Stat. § 375.936). In addition, the Missouri Legislature created the Department of Insurance (Mo. Rev. Stat. § 374.005) and granted to the Director of that Department the "full power and authority to make all reasonable rules and regulations" to, among other things, regulate the affairs of companies operating in the insurance market and to enforce such rules and regulations. Mo. Rev. Stat. §§ 374.010, 374.045.

Third, imposing an unlimited duty of loyalty on commercial insurance brokers would effectively turn insurance brokers into trustees, who are subject to the most stringent duties because of their special relationship with and power over their beneficiaries. While trustees are reposed with special control over trusts and beneficiaries warranting the imposition of a heightened, unlimited "duty of loyalty," the relationship between Marsh, "one of the largest insurance brokers in the world" and Emerson, "a global industrial company," much more resembles that of "workaday world," "arm's length" transactions that this Court has noted do not warrant such duties.

See In re Cupples, 952 S.W.2d 226, 235 (Mo. 1997) ("[m]any forms of conduct [are] permissible in a workaday world for those acting at arm's length").

Indeed, the cases cited by Emerson in support of its arguments demonstrate precisely why trustees should owe their beneficiaries a heightened fiduciary duty, including a general duty of loyalty, and why commercial insurance brokers dealing with sophisticated corporate clients should not. *See, e.g., Ramsey v. Boatmen's First Nat'l Bank of Kan. City*, 914 S.W.2d 384, 386 (Mo. App. 1996) (co-trustees owed heightened fiduciary duty to 92-year-old beneficiary who "had no training in financial matters [and] has relied on others to help conduct her financial affairs throughout her life"); *Tyler v. Citizens Home Bank of Greenfield, Mo.*, 670 S.W.2d 954, 956 (Mo. App. 1984) (co-trustees allegedly breached undivided duty of loyalty to trust and beneficiary when they manipulated 90-year-old co-trustee who was "inexperienced in business and unable to understand the consequences of her acts" to improperly deny beneficiary of his trust funds) (cited in Subst. Br. at 11).

Fourth, imposing an unfettered duty of loyalty on insurance brokers would be inconsistent with the dual agency role brokers play in commercial insurance transactions. In its Opinion, the Court of Appeals pointed out that the scope of the broker's fiduciary duty of skill, care, and diligence owed to the insured is limited because the insurance broker at times acts as the agent for the insurer, such as when collecting premiums. (App. Op. at A4-A5 ("The reality that insurance brokers often occupy differing agency positions at various points during the insurance transaction has limited the period during which the broker is an agent of the insured.").) Not only does this fact limit the temporal

scope of the insurance broker's fiduciary duty, but it should limit the substantive scope as well. If a broker at times acts on behalf of the insurer and at times on behalf of the insured as part of the same insurance transaction, and typically is paid by the insurer through commissions, it cannot be that an insurance broker must be held, as Emerson urges, to the *Restatement*'s requirement to "act solely for the benefit of the principal [*i.e.*, the insured] in all matters connected with his agency." (Subst. Br. at 11 (citing § 387 of the *Restatement*).)

The Court of Appeals' Opinion tacitly recognizes this contradiction. Again, when considering the scope of the new duty of loyalty it imposed on insurance brokers, the Court of Appeals went out of its way to highlight the limits of that duty noting that "insurance brokers are agents of the insured, **albeit in a limited capacity**," and that the duty of loyalty attaches "**in the limited contex**t of an insurance broker's fiduciary duty to a client." (App. Op. at A6- A7 (emphasis added).) And, as discussed above (see supra § I), the Court of Appeals also recognized it had to make any common law duties owed by an insurance broker subordinate to the commercial activities allowed by the Legislature's regulation of the insurance industry.

* * *

In sum, the Court of Appeals was correct when it held that insurance brokers are agents of the insured, and that agents owe their principals fiduciary duties including the duty of loyalty. For all the reasons discussed above, however, the Court of Appeals also was correct when it limited the scope of the duty in a manner consistent with every prior Missouri case that has considered the duties owed by an insurance broker to an insured.

(*See* App. Op. at A5 ("Missouri courts have expressed a number of policy concerns when considering the extent of an insurance broker's duty [and] have been unwilling to require 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 ….").) This Court should decline Emerson's invitation to expand the common law duty owed by insurance brokers in any broader fashion.

CONCLUSION

For these reasons, Marsh respectfully requests that this Court affirm the trial court's grant of judgment on the pleadings.

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CERTIFICATE OF SERVICE AND COMPLIANCE
WITH RULE 84.02(b) And (c)

Pursuant to Rule 103.08, the undersigned hereby certifies that on this 10th day of November, 2011, the foregoing Respondents' Brief was filed electronically with the Clerk of Court to be served by operation of the Missouri eFiling System upon the following counsel of record:

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The undersigned further certifies that the foregoing Respondents' Brief complies with the requirements contained in Rule No. 84.06(b) and (c). Based on the number of words of text in the Brief as determined by the word count of Microsoft Word, the number of words in this Brief is 10,992.

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