

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

Superior Court  
C.A. No. 85-1504

AMERICAN MACHINERY CO., INC.  
Plaintiff

vs.

KEMPER INSURANCE CO., THE  
WALNUT ADVISORY CORPORATION,  
HOWARD MARTIN CO., INC.  
Defendants

MEMORANDUM AND ORDER

HAMPDEN COUNTY  
SUPERIOR COURT

**FILED**

JAN 17 1986

*William J. Martin*

CLERK/MAGISTRATE

This is a civil action in which the plaintiff seeks to recover damages under an insurance policy issued to it by the defendant, Kemper Insurance Co. (Kemper), for a loss allegedly sustained by it when certain machinery was damaged while in transit, plus penal damages and attorney fees for various alleged unfair and deceptive insurance practices. The defendants are Kemper; Walnut Advisory Corporation, Inc. (Walnut), the insurance broker who placed the insurance policy with Kemper; and Howard Martin Co., Inc., the shipper of the allegedly damaged machinery. The case is now before me on Walnut's motion to dismiss which I intend to treat as a motion for summary judgment. On the basis of the pleadings, the return of service, an affidavit of Sigmar Hessing (an employee of Walnut), and statements of plaintiff's attorney in open court, the following facts appear to be undisputed.

Walnut is a duly organized corporation with a principal place of business in Berkeley Heights, New Jersey. It has never solicited any business in Massachusetts and has never maintained any office, bank account, employees or agent in this state. In 1977 it was acting as a broker for Kemper. Kemper's principal place of business was at the World Trade Center in New York City.

At some time in 1977 an employee of the plaintiff contacted Mr. Hessing by telephone at Walnut's office in Berkeley Heights, New Jersey, and requested that Walnut procure

Ocean Cargo Insurance for it. On the basis of that telephone call Walnut procured such a policy of insurance for the plaintiff from Kemper. All communications between the plaintiff and Walnut were made through correspondence or by telephone. No employee of Walnut ever traveled to Massachusetts or solicited business within Massachusetts.

After this action was commenced, service of process on Walnut was made by mailing a copy of a summons and a copy of the complaint by certified mail, return receipt requested, to Walnut at its Berkeley Heights, New Jersey office. Walnut's motion to dismiss the complaint is made on the ground that this court has no jurisdiction over Walnut.

The plaintiff does not argue (nor, in my judgment, can it) that the service of process on Walnut was sufficient under the provisions of our "long-arm" statute (G.L.c.223A) to subject Walnut to the jurisdiction of this court. The procuring of a policy of insurance by an out-of-state broker in response to a telephone call request does not constitute the "transacting" of business in this commonwealth. The plaintiff contends instead, however, that the service was sufficient by virtue of the provisions of G.L. c.175B.

G.L. c.175B, the Unauthorized Insurers Process Act, subjects "certain insurers," who have issued or delivered policies of insurance in this commonwealth while not authorized to do business here, to the jurisdiction of our courts. In its first section, the legislature expressed its concern that many residents of this commonwealth held policies of insurance issued or delivered in this commonwealth by such "insurers" and were required to resort to distant forums for the purpose of asserting legal rights under such policies. The act was intended to provide a method of substituted service of process upon such "insurers" so that redress could be sought and obtained in our courts.

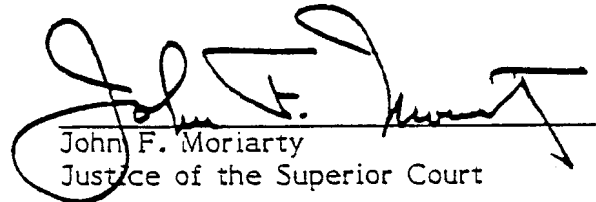
Although G.L. c.175B regulates service upon "insurers," it does not define the word "insurer." Generally speaking, however, an "insurer" is the underwriter or insurance company with whom a contract of insurance is made. It is the person who undertakes to indemnify another by a contract of insurance. Black's Law Dictionary, III Edition. It does not usually include an insurance agent or broker.

The word "insurer" is defined in G.L. c.175, §1 and in G.L. c.175A, §3 as "all corporations,

associations, partnerships or individuals engaged as principals in the business of insurance." (Emphasis supplied). At least for purposes of those statutes (and Chapter 175 is the chapter regulating the insurance industry in general), the legislature clearly excluded persons engaged in that business as agents or brokers from the definition. Furthermore, where the legislature has intended to subject insurance agents and brokers to regulation along with others engaged in the insurance business, it has done so explicitly. (See G.L.c. 176, §1[a] ). I conclude that G.L. c.175B does not authorize service of process upon insurance brokers or agents.

In this case Walnut in its dealings with the plaintiff was acting as an insurance agent or broker and not as an "insurer." It follows that G.L. c.175B is not applicable to it. It follows further that this court lacks jurisdiction over Walnut in this action.

Accordingly it is ordered that summary judgment be entered for the defendant, Walnut Advisory Corporation, dismissing Counts I and II insofar as they seek judgment against Walnut and Counts V, VI, VII, VIII and IX with costs.

  
John F. Moriarty  
Justice of the Superior Court

Entered: January 17, 1986.