

Federal District Court Dismisses RICO and Sherman Act Claims in Massive Putative Class Action Against the Nation's Largest Commercial Insurance Brokers and Carriers

In September 2007, Chief Judge Brown of the Federal District Court of New Jersey dismissed with prejudice all of the RICO and Sherman Act claims asserted against the nation's largest commercial insurance brokers and carriers in a massive putative class action alleging a nationwide bid rigging and market allocation conspiracy. Prompted by a New York Attorney General investigation, plaintiffs had filed a flurry of private putative class actions in federal courts across the nation, alleging a conspiracy that involved hundreds of companies and every line of commercial insurance sold in all fifty states over a twelve-year period. The MDL Panel consolidated these cases into one proceeding and transferred them to New Jersey.

This was the defendants' third motion to dismiss. The court granted the defendants' first two motions to dismiss without prejudice, allowing the plaintiffs to re-plead their factual allegations. Both times, the court found that the plaintiffs had failed to allege a horizontal agreement to allocate markets in violation of the Sherman Act and failed to allege almost all the essential elements of a RICO violation (enterprise, unity, distinctiveness, and predicate act elements) with the particularity required by Rule 9(b). Given a third opportunity to state a claim under federal law, plaintiffs failed again to allege viable claims against the insurance company and broker defendants. The court found the same defects in the complaint, and this time, it dismissed the plaintiffs' claims with prejudice.

This case grew out of an investigation begun in 2004, when then-New York Attorney General Eliot Spitzer launched a probe into the nation's largest commercial insurance brokers and carriers that focused on contingent commission arrangements. Unlike up-front commissions that are calculated as a percentage of the policyholder's premium, carriers pay contingent commissions to a broker only if the broker's entire book of business with that carrier over a specified time period hits certain performance milestones based upon the profitability, volume, or growth of that broker's book.

Mr. Spitzer alleged that brokers owed their clients a fiduciary duty to provide them unbiased advice in helping them buy the best combination of insurance coverage and service at the lowest price. He also alleged that several large brokers breached that fiduciary duty by both failing to disclose contingent commissions and by steering their customers to the carriers that paid the highest 'kickbacks,' rather than the carriers that offered the best value. Mr. Spitzer also alleged a handful of episodes in which one office of one broker solicited fake quotes from a few carriers to help convince a client to purchase a particular line of insurance from a preferred carrier. As a result of the Spitzer investigation, several employees from several brokers and carriers have pleaded guilty to fraud and antitrust violations, several other employees have been indicted, and several brokers and carriers have settled civil claims with the attorney general for a total of more than \$2 billion.

The Spitzer investigation spawned the private putative class actions that later became the consolidated MDL in Chief Judge Brown's court in New Jersey. These private five cases, however, were not limited to the one broker and one line of insurance that was the focus of the Spitzer probe. Instead, they alleged a nationwide conspiracy involving hundreds of companies and every line of commercial insurance sold in any part of the country over twelve years.

After dismissing the RICO and Sherman Act claims, the New Jersey district court refused to exercise supplemental jurisdiction over various state law claims that were also part of the case.

Vinson & Elkins represented a *Fortune 100* property and casualty insurer in this case.

Prior results do not guarantee a similar outcome.