

STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT

HERITAGE HEALTHCARE SERVICES, INC. :
VITO'S EXPRESS, INC., SHIRE CORPORATION, :
SWIMMING POOL SPECIALIST, INC., NORTH :
PROVIDENCE EMERGENCY MEDICAL SERVICES, :
INC., RHODE ISLAND TIRE CO., INC., AND : C.A. NO. 2002-7016
CHUCK & SONS, INC., :

Plaintiffs, :

v. :

THE BEACON MUTUAL INSURANCE COMPANY, :
JOSEPH ARTHUR SOLOMON, :
JEFFREY CARLETON JOHNSON, :
MICHAEL DENNIS LYNCH, AND :
JOHN DOES 1-100, :

Defendants. :

JOINT MEMORANDUM OF AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL FOR THE
DEPARTMENT OF BUSINESS REGULATION'S MARKET CONDUCT
EXAMINATION REPORTS ON BEACON MUTUAL INSURANCE COMPANY

In response to the Court's invitation for amicus curiae briefs, the following organizations, who represent over 50 million consumers and policyholders, file this memorandum in support of the discoverability of the market conduct examinations at issue in the above captioned litigation. The Amici are:

United Policyholders, a national 501(c)(3) organization dedicated to advancing the interests of insurance policyholders through education and advocacy. UP gives practical guidance on coverage and claim issues to disaster survivors, property and business owners and is a voice for insureds in legislative, litigation and other policy-making forums. UP monitors marketplace and legal developments that impact insureds and is in constant contact with claimants and claim professionals. UP is a Funded Consumer Representative at the National Association of Insurance Commissioners (NAIC);

Consumer Federation of America, a non-profit association made up of some 300 pro-consumer groups representing over 50 million consumers nationwide through advocacy and education, including specifically insurance matters nationally. CFA's Director of Insurance, J.

Robert Hunter, is former Federal Insurance Administrator and former insurance commissioner of Texas;

The California Reinvestment Coalition, which advocates for the right of low-income communities and communities of color to have fair and equal access to banking and other financial services, including insurance. CRC has a membership of more than 240 nonprofit organizations and public agencies;

Empire Justice Center, a non-profit law firm that works to protect and strengthen the legal rights of people in New York State who are poor, disabled or disenfranchised through: systems change advocacy, training and support to other advocates and organizations, and high quality direct civil legal representation. EJC is also a Funded Consumer Representative to the NAIC;

New Jersey Citizen Action, the state's largest citizen watchdog organization representing over 60,000 family members and more than 100 senior, labor, faith-based, environmental, tenant and women's organizations;

A. Introduction

Market conduct examinations are essentially audits that focus on the business practices of insurers and producers (agents and brokers) and are designed to monitor marketing, advertising, policyholder services, underwriting, rating, and claims practices. The adopted reports are generally public records that can be viewed, copied and read online by the public,¹ and are discoverable in civil litigation.

Market Conduct Examinations are conducted by examiners appointed by a state insurance regulator. The examined insurer has an opportunity to comment on and request that changes be made to the examiner's report before (if ever) it is adopted by the regulator. Insurers' requested changes are frequently accepted by the regulator, and there is public concern about the non-transparent process of regulators making changes to the examiner's reports. Because the examiner's verified market conduct examination report is the direct result of the examiner's independent audit of

¹ See, e.g. State of Wisconsin Office of Commissioner of Insurance website; <http://oci.wi.gov/markcond.htm>; State of Missouri, <http://insurance.mo.gov/aboutMDI/mktreg/mktcond.htm>, State of North Dakota, <http://www.nd.gov/ndins/communications/details.asp?ID=227>; State of California, <http://www.insurance.ca.gov/0100-consumers/0040-studies-reports/0030-market-conduct/>; State of Washington, <http://www.insurance.wa.gov/oicfiles/marketconduct/2000mc/AlexanderHamilton-rpt.pdf>

the marketing, underwriting, pricing and claims paying practices of an insurer, it is a vital independent source of information about the insurer's practices in these areas, and particularly material for the courts and counsel representing an insurer's policyholders in litigation about alleged wrongdoing in such business operation areas. To the extent the insurer believes the examiner made any errors, the insurer's comments reflect its opinion to that effect, including for the litigants, or insurers will otherwise make that clear during the discovery process. See RICR 26 ("It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.")

Published examination reports and their findings have often led to correcting unlawful claim, underwriting and sales practices, and thus have a salutary impact on the insurance system. Similarly, the examiner's independent report contributes to the adversarial process in litigation and assists the plaintiffs in pursuing their claims through the discovery process. Ultimately, the independent report assists the courts to get to the merits of claims that an insurer engaged in specific misconduct or misconduct as a general practice. Where wrongdoing is found through the adversarial process, including trial, then the court directs its cessation and appropriate remedies. Importantly, to the extent the examiner's report contains facts or conclusions that are contested by the insurer, the adversarial system is equipped to get to the truth in the pre-trial phases of litigation.

Amici know of no instance where the publication, or specifically the discovery by plaintiffs in litigation, of a final market conduct examination report or examiner's examination report has caused any financial harm to any insurance company. Of course, when the examiner's reports are produced in discovery, and subject to a protective order, the reports are not made public but are available to all the parties (not just the insurer) in the discovery process and, as noted, the reports

ultimately assist the court where the underlying facts are subject to the rigors of the adversary process.

The Amici identified herein are greatly concerned that by attempting to improperly prevent the discovery of examination findings, the Rhode Island Department of Business Regulation (Department) will defeat the salutary impact of market conduct examinations in the adversarial litigation process. The Department is seeking to deny private litigants the right to discover an examiner's market conduct reports even though the Rhode Island insurance company examination statute, on its face, only prevents the subpoena of "ancillary" information and does not prohibit discovery of examination reports. Because the other states in the country have similar (although not identical) insurance examination statutes to that in Rhode Island, a court grant of Beacon's and the regulator's request to quash the plaintiffs' discovery request could establish dangerous precedent denying private litigants access to these non-privileged examination reports (which reports the insurance company has), even where the litigants have agreed not to make the reports public. While the Amici are not familiar with the merits of this litigation, if the reports are material to this policyholder litigation (and they very often are in such policyholder lawsuits), then the court should order that the reports be provided to the plaintiffs as there is no privilege nor statutory basis to exclude them from discovery.

B. Matters at Issue

The Amici are briefing three related matters we understand to be at issue:

1) whether a report or reports prepared by an examiner(s), that was transmitted by the Department of Business Regulation (Department) to the examined company (in this case Beacon Mutual Insurance Company), is protected from discovery in private litigation by the insurance company examination statute, R.I.G.L § 27-13.1-1 *et seq.*;

- 2) whether the specific report transmitted by the Department to Beacon on February 19, 2007 is privileged and thus exempt from discovery in private litigation; and
- 3) whether the final examination report is exempt from such discovery.

C. Legal Argument

All of the issues identified above should be answered in the negative for the reasons stated herein. The Rhode Island insurance company examination statute specifically defines what documents are confidential and protected from “subpoena.” Section 27-13.1-5(f) states -

Confidentiality of ancillary information. All working papers, recorded information, documents, and copies of them produced by, obtained by, or disclosed to the director or any other person in the course of an examination made under this chapter must be given confidential treatment and are not subject to subpoena and may not be made public by the director or any other person, except to the extent provided in subsection (e). Access may also be granted to the National Association of Insurance Commissioners. The parties must agree in writing prior to receiving the information to provide to it the same confidential treatment as required by this section, unless the prior written consent of the company to which it pertains has been obtained.

This language obviously omits any mention of the examiner’s report or the insurance commissioner’s final examination report. In contrast, another section of the statute expressly discusses “work papers” and general documents, as well as the “final or preliminary” examination reports. Section 27-13.1-4(f) states -

Nothing contained in this chapter shall be construed to limit the director's authority to use, and if appropriate, make public any final or preliminary examination report, any examiner or company work papers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the director may, in his or her sole discretion, deem appropriate.

This demonstrates that the “confidentiality” provision, Section 27-13.1-5(f), cannot be read to include these separately identified, and identifiable reports. If that were not enough, the confidentiality provision states what its purpose is – it is captioned “Confidentiality of ancillary information”. The examination reports are not by any credible measure “ancillary” information to

the examination in the way working papers and other documents obtained in the process of conducting an examination are clearly ancillary to it. The examination report by the examiner (which must contain his conclusions and recommendations) is the product of the examination, not ancillary to it.

Moreover, Section 27-13.1-5(a) defines examination reports,² and Section 5(b)³ dictates the procedures to be followed by the examiner and the Department in communicating the examiner's report to the examined insurance company. There is nothing in the statute to suggest that these clearly defined examination reports are "ancillary information". See State v. Benoit, 650 A.2d 1230, 1232 (R.I. 1994) (the legislature is presumed to have intended that every word, sentence and provision has a useful purpose and will have some force and effect). To the contrary, the examiner's report is authored by the examiner and the examined insurance company is required to respond per Section 27-13.1-5(b). The commissioner either adopts the examiner's report or adopts a modified report based on the company's response or the commissioner's own further investigation per Section 27-13.1-5(c). These preliminary and final reports are the product of the examination. As the Amici understand it, the plaintiffs in this litigation are not seeking the examiner's or Department's work papers or other such ancillary information.

D. Conclusion

² "(a) General Description. All examination reports shall be comprised of only facts appearing upon the books, records, or other documents of the company, its agents or other persons examined, or as ascertained from the testimony of its officers or agents or other persons examined concerning its affairs, and the conclusions and recommendations as the examiners find reasonably warranted from the facts."

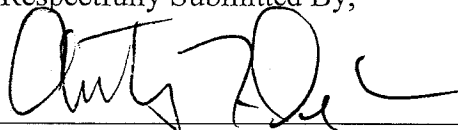
³ "(b) Filing of examination report. No later than sixty (60) days following the completion of the examination, the examiner in charge shall file with the department a verified written report of examination under oath. Upon receipt of the verified report, the department shall transmit the report to the company examined, together with a notice that shall require that the company examined file with the commissioner a written response to all comments and recommendations contained in the examination report. The response shall include a written plan of how and when the comments and recommendations contained in the examination report will be corrected and/or implemented. For each comment and recommendation, the response must include an implementation date and a completion date for each corrective action. In lieu of these requirements, the company may submit a rebuttal to any comment or recommendation contained in the examination report."

An examiner's report that is "transmit[ted]" (the language in Section 27-13.1-5(b)) by the Department to Beacon is not ancillary information and is not exempt from discovery in private litigation. Similarly, there is nothing in the statute to change this conclusion with regards the examination report transmitted by the Department to Beacon on February 19, 2007. Certainly, Section 27-13.1-4(b) – which we understand the Department relied on in oral argument before the court – does not change the statutory procedures for transmitting an examiner's report to Beacon for its comments or rebuttal, and cannot transform that document into "ancillary information" subject to the confidentiality provision in Section 27-13.1-5 (where such reports are not even mentioned). Finally, there is nothing in the statute to preclude private litigants from obtaining the insurance commissioner (director's) final examination report in discovery, whether or not he makes it public pursuant to Section 27-13.1-5(e).⁴

In the interests of fair judicial process, the insurance-buying public and the integrity and accountability of the insurance regulatory system, and pursuant to the arguments set forth herein, *Amici* respectfully request that the requested discovery be permitted in this case.

⁴ "(e) Publication and use. (1) Upon the adoption of the examination report under this section, the director shall continue to hold the content of the examination report as private and confidential information for a period of thirty (30) days following the mailing of the notice of order, except to the extent provided in subsection (b). After this, the commissioner may open the report for public inspection so long as no court of competent jurisdiction has stayed its publication; [subsection (2) and (3) omitted]."

Respectfully Submitted By,



Anthony DeMarco, Esq. #0799
Reynolds, DeMarco & Boland, Ltd.
170 Westminster Street, Suite 200
Providence, RI 02903
(401) 861-5522
Fax: (401) 331-4861

On behalf of the following Amici:

United Policyholders
222 Columbus Ave., #412
San Francisco, CA. 94133
(415) 393-9990

Consumer Federation of America
1620 I Street, NW, Suite 200
Washington, DC 20006
(202) 387-6121

Empire Justice Center
One West Main Street, 2nd Floor
Rochester, NY 14614
(585) 295-5815

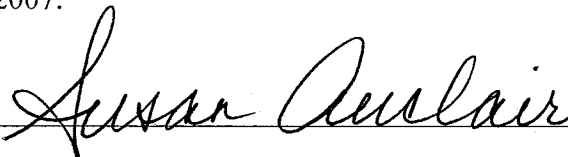
New Jersey Citizen Action
744 Broad Street, Suite 2080
Newark, NJ 07102
(973) 643-8800

California Reinvestment Coalition
474 Valencia St, Ste 110,
San Francisco, CA 94103
(415)864-3980

March 20, 2007

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of this memorandum to the counsel listed below by first class mail, postage paid, on the 20th day of March, 2007.



Elizabeth Kelleher Dwyer
Deputy Chief of Legal Services
Department of Business Regulation, Insurance Division
233 Richmond Street, Suite 235
Providence, RI 02903

Jason B. Adkins
Adkins, Kelston & Zavez, PC
90 Canal Street, Suite 500
Boston, MA 02114

Donald J. Maroney
Kelly, Kelleher, Reilly & Simpson
146 Westminster Street, Suite 500
Providence, RI 02903

John B. Harwood
McKinnon & Harwood
1168 Newport Avenue
Pawtucket, RI 02861

Melissa Darigan
Partridge Snow & Hahn, LLP
180 South Main Street
Providence, RI 02903

J. Renn Olenn
Olenn & Penza
530 Greenwich Avenue
Warwick, RI 02886