feature

The Broker in the Middle: The Law of Broker Compensation

Louis J. Aurichio
Amy B. Kelley

Louis J. Aurichio

Amy B. Kelley

...courts in Minnesota and Connecticut have provided new guidance with respect to the issue of broker compensation.

* Lou Aurichio and Amy Kelley are partners at Butler Rubin Saltarelli & Boyd LLP. They both concentrate their practice on arbitration and litigation of reinsurance disputes, as well as other areas of complex commercial litigation. Lou and Amy, along with Jim Rubin, represented Carvill in the *XL Specialty v. Carvill* case discussed in this article. The views expressed in this paper do not necessarily reflect the views of Butler Rubin Saltarelli & Boyd LLP, any of its attorneys, or those of its clients.

Reinsurance brokers have always walked a difficult line - hired by insurance companies to develop and place reinsurance programs but traditionally negotiating their compensation with the reinsurance companies with whom they place the business. This relationship can get even more complicated when a reinsurance broker is terminated mid-term, that is, when the insurance company terminates the broker's services before the expiration of the reinsurance placed by that broker. In such a situation, questions may arise with respect to which entity is actually paying the broker, whether the broker's commission was fully earned at placement, and the obligations the broker owes, if any, to the respective parties.

Until recently, case law in this area was very limited. In two recent decisions, however, courts in Minnesota and Connecticut have provided new guidance with respect to the issue of broker compensation. The courts have held that (i) reinsurance brokers are paid by the reinsurers for whom they produce the underwriting opportunity; (ii) the brokerage commission is earned upon placement notwithstanding the broker's ongoing servicing obligations; and (iii) while the broker is the fiduciary of the ceding company, there are at least some limits on the extent of the broker's fiduciary obligations to the ceding company in the context of the broker's negotiation of its compensation with the reinsurers. Each of these holdings is discussed in greater detail below.

The Broker Market

To put our discussion in context, we start with a brief review of the role of a reinsurance broker. As the reader surely understands, there are two distinct markets in which reinsurance is bought and sold: the direct market and the broker market. In the direct market, reinsurers solicit underwriting opportunities directly from the ceding companies via their own in-house marketing departments. In the broker market, reinsurers use a reinsurance broker as their external marketing arm - relying almost entirely on the broker to bring them underwriting opportunities.

As a result, an insurance company wanting to access the broker market generally needs to retain a reinsurance broker to implement its reinsurance program. The ceding company and the broker will typically enter into a broker of record letter at the outset of their relationship, specifying that the broker is the agent of the ceding company for purposes of implementing the client's reinsurance program. The NAIC Model Reinsurance Intermediary Act (and the various state statutes that have adopted the Model Act) also sets forth certain provisions which must be included in the written agreement between the ceding company and the broker. Significantly, for purposes of this discussion, the NAIC Model Act does not address the terms of the broker's compensation. Thus, broker of record letters are frequently silent on this issue.

Absent any special agreement in the broker of record letter or otherwise, the broker typically negotiates its compensation with the reinsurers with whom it ultimately places the reinsurance on behalf of the ceding company. The terms of the broker's compensation as agreed between the broker and the reinsurers are generally set forth in the placement slip. Reinsurance brokers typically receive a brokerage commission that is based on a specified percentage of the reinsurance premiums to be paid to the reinsurers by the ceding company. In such a situation, the broker deducts its commission upon receipt of the premium payments from the ceding company and then forwards the

net premium payments to the reinsurers.

Not surprisingly, this practice becomes more complicated when the broker that placed the reinsurance program is terminated before the end of the contract term. If the ceding company shifts the servicing of the reinsurance program to a new broker, then the placing broker is no longer in a position to simply deduct its commission before making the net premium payments to the reinsurers. As a result, questions may arise with respect to the placing broker's entitlement to the remaining commission payments.

The Recent Decisions

Benfield v. Moline

The United States District Court for the District of Minnesota was the first court in the United States to directly address this issue. In *Benfield, Inc. et al. v. David Moline et al.*, Civil File No. 04-3513, 2006 WL 452903 (D. Minn. Feb. 22, 2006), the court granted summary judgment on Benfield's claim that another broker, John B. Collins Associates, Inc., had committed the tort of conversion when it retained brokerage commissions on reinsurance contracts that had been placed by Benfield. The court held that, as the placing broker, Benfield was entitled to the brokerage commissions until the end of the treaty term despite the fact that the servicing of the treaties had been transferred to Collins. The court also held, however, that Collins could introduce evidence with respect to the cost of servicing that had been avoided by Benfield prior to a determination of the actual damages to be awarded to Benfield.

Looking at the *Benfield* case in further detail, the dispute arose in the context of the departure of two employees, David Moline and Mark Hagan, from Benfield to Collins. Following the departure of Moline and Hagan, Benfield filed suit against the two brokers, as well as their new employer, Collins, alleging a variety of claims arising out of their employment contracts with Benfield, which included certain restrictive covenants and confidentiality agreements. Benfield also brought a claim against Collins for conversion, alleging that Collins had wrongfully converted Benfield's money by inducing several clients to transfer their accounts to Collins before the terms of their reinsurance treaties, placed by Benfield, expired. Benfield further alleged that following the transfer of the accounts, Collins had retained for its own benefit all of the commissions payable on the premium payments due under the reinsurance placed by Benfield.

Benfield thereafter moved for partial summary judgment on its claim of conversion, as well as a declaratory judgment claim seeking a declaration as to the ownership of the brokerage commissions. In considering Benfield's motion, the court first made several findings with respect to the relevant custom and practice in the industry, including the fact that (i) Benfield is generally compensated for its brokerage work by an up-front commission or by a periodic payment through a percentage deduction from the reinsurance premiums submitted to the reinsurers through Benfield; (ii) the reinsurer pays the commission; and (iii) reinsurance clients generally do not move their accounts before treaty renewal period, although they are free to change brokers at any time.

The court then held that because Collins did not deny collecting the commissions paid on reinsurance treaties placed by Benfield and transferred to Collins, "the only issue before the Court is which party owns the commissions." *Id.* at *14. In addressing this question, the court noted that neither party had provided the court with any contracts relating to the commissions and that it was not clear to the court whether there was, in fact, "any written agreement between the reinsurer and the placing broker." *Id.*[i] The court was therefore left to determine the question of "which party owns the commissions" without reference to any of the relevant contractual documents.

To advance its argument that it owned the commissions, Benfield contended that it is a well-accepted rule that "a reinsurance broker earns its commission upon the placement of the reinsurance contracts request[ed] by the insurance company client." *Id.* at *15. In support of this argument, Benfield relied on cases arising in the primary insurance context in which the courts have repeatedly held that, absent an agreement to the contrary, an insurance broker earns its commission when it brings about the relationship of insurer and insured.[ii] Benfield

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The Court concludes that the general rule for insurance brokerage commissions applies to the reinsurance industry: generally, reinsurance brokerage commissions are earned at placement; if the client switches brokers partway through the insurance contract year, the initial broker is still entitled to those commissions until the treaty renewal period.

The court further held that XL Specialty tortiously interfered with Carvill's business relationship with the reinsurers by taking certain deliberate actions after terminating Carvill that prevented the reinsurers from paying Carvill the commission specified in the placement slips.

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argued that "[l]ike reinsurance brokers, primary insurance brokers assess their clients' needs, assist them with claims submissions, and facilitate communications between the insurer and the insured." *Id*. Benfield further argued that "the reinsurance brokerage commission is based on the reinsurance treaty's premium; thus, the client's need for services after the treaty is secured has no effect on the amount of the brokerage commission." *Id*.

The court was persuaded by Benfield's arguments - at least in part. The court held as follows:

> The Court concludes that the general rule for insurance brokerage commissions applies to the reinsurance industry: generally, reinsurance brokerage commissions are earned at placement; if the client switches brokers partway through the insurance contract year, the initial broker is still entitled to those commissions until the treaty renewal period. Because neither party has submitted any evidence regarding the existence and terms of any contracts governing brokerage commissions, the general presumption applies. As the placing broker, Benfield is entitled to the brokerage commissions until the end of a treaty term.

Id. The Court thus granted Benfield's motion for summary judgment on liability on Benfield's conversion claim. The question of Benfield's damages was left for trial.

Consistent with its claim that "the client's need for services after the treaty is secured has no effect on the amount of the brokerage commission," Benfield subsequently brought a motion in limine to exclude evidence of servicing costs at trial. Noting that the goal of the law of torts is to place an injured party in the position they would otherwise have been in were it not for the tortious behavior, the court concluded that evidence of the servicing costs would be admissible at trial to address the issue of damages for the conversion claim. The court reasoned that "[a]lthough Collins committed a tort by converting commissions that rightfully belonged to Benfield, its tortious actions may have also benefited Benfield by relieving it of the costs associated with servicing those clients." *Benfield v. Molline*, 2006 WL 1662759, *2 (D. Minn. June 12, 2006). The court therefore held that "[a]llowing Benfield to recover the entire commissions while at the same time allowing it to reap the benefit of saving substantial servicing costs would grant Benfield a windfall." *Id*. The court thus denied Benfield's motion in limine to exclude evidence of servicing costs at trial.

The case was, however, never tried. According to the case docket, Benfield filed a stipulation of dismissal with prejudice on October 30, 2006.

XL Specialty v. Carvill

At the same time that the *Benfield v. Moline* case was being decided in Minnesota, there was another case pending in Connecticut in which the court was about to consider the same issues, albeit in a slightly different context. On May 31, 2007, following a five-week bench trial, the Connecticut Superior Court issued a decision in *XL Specialty Insurance Company v. Carvill America, Inc. et al.,* Case No. X04-CV-04-4000148-S, 2007 WL 1748157 (Conn. Super. May 31, 2007). Like *Benfield*, the *XL Specialty* dispute presented the question of whether a reinsurance broker is entitled to receive full brokerage commission on treaties it placed even though the cedent terminated its relationship with the broker before the end of the treaty periods. Here again, the court answered this question in the affirmative, holding that XL Specialty's termination of Carvill as broker of record for the subject reinsurance placements did not terminate the participating reinsurers' independent contractual obligation to pay Carvill the brokerage set forth on the slips. The court further held that XL Specialty tortiously interfered with Carvill's business relationship with the reinsurers by taking certain deliberate actions after terminating Carvill that prevented the reinsurers from paying Carvill the commission specified in the placement slips. *XL Specialty* at *11-12.

Carvill served as XL Specialty's broker of record from 1999 to mid-2003 during which time Carvill assisted XL Specialty in placing six treaties reinsuring professional liability policies written by XL Specialty. *Id*. at *3. The court found that the contractual relationship among the parties to the reinsurance placements was embodied in three separate

agreements, which the court likened to a three-legged contractual stool. The first contractual relationship, between Carvill and XL Specialty, was memorialized in a Broker of Record Appointment Letter ("BOR") signed by Carvill and XL Specialty. *Id* at *5. As is typical, the BOR did not set the terms of Carvill's compensation. The BOR did, however, state explicitly that no fees or other remuneration were to be paid by XL Specialty to Carvill; rather, "remuneration earned by Carvill is to be received from the reinsurer(s) to which [XL Specialty's] premium is ceded as is customary in the industry." *Id*.

The second contractual relationship found by the court is the one between the broker and the reinsurers, as defined in the placement slips. *Id*. Consistent with the BOR provisions, which stated that XL Specialty paid no remuneration to Carvill, Carvill's brokerage commission (a percentage of the premiums paid to the reinsurers) was set forth in the placement slips prepared by Carvill and executed by the reinsurers. *Id*.

The court found that the "third leg of the contractual stool" is the one between the reinsured and the reinsurers, which is ultimately embodied in the treaties. *Id*. The treaties did not include reference to Carvill's commission, but the intermediary clause did require that the premiums be paid to the reinsurers through the broker who, by custom, deducts its commission and forwards the balance of the premium to the reinsurers. *Id*.

In August 2003, before the expiration of the most recently placed treaties, XL Specialty terminated Carvill's appointment as its broker of record. *Id*. at *4. In early 2004, XL Specialty sued Carvill, alleging that the reinsurance broker engaged in misconduct in the execution of its duties as XL Specialty's broker. XL Specialty claimed that Carvill was not entitled to any further brokerage following its termination, and that Carvill's alleged malfeasance required it to pay XL Specialty part of the brokerage it had already earned during the period in which it represented XL Specialty. Carvill brought a counterclaim for tortious interference with business expectancy and breach of contract.

In a 99-page decision, the Connecticut court first addressed Carvill's counterclaim. The evidence established that following Carvill's termination, XL Specialty instructed the replacing broker, Benfield, not to forward to the reinsurers that portion of the premium which would be paid to Carvill as commission pursuant to the slips. *Id* at *8. Rather, XL Specialty directed Benfield to withhold that sum and place it in a segregated account held to XL Specialty's order pending the outcome of the dispute. *Id*. Based upon these facts, the court held that XL Specialty tortiously interfered with Carvill's business relationships with the reinsurers. The court reasoned that "the termination of the reinsured-broker contract did not have the effect of terminating the contract between the reinsurers and Carvill." *Id*. at *11. To the contrary, there was a "cognizable business relationship between Carvill and the reinsurers that survived the appointment of Benfield as the new intermediary." *Id*. By directing Benfield to withhold from the reinsurers the portion of the premium that would ordinarily be paid to the placing broker, XL intended to prevent the reinsurers from paying Carvill its commission. The court emphasized that there was no "discernable justification" for XL Specialty's conduct: "even if Carvill had breached the contract between it and XL, such breach would not justify interference with the contracts between Carvill and the reinsurers." *Id*. at *12.

The court found that the proper measure of damages is the money that Carvill would have received had there been no interference. *Id*. at *37. Accordingly, the court awarded Carvill the full amount of commissions earned on premium ceded by XL Specialty after Carvill's termination pursuant to the treaties placed by Carvill, less "the expense Carvill saved by not having to service the treaty after termination." *Id*. Because there was no direct evidence of the cost of servicing in evidence, the court deducted 10% from the award, which is the percentage of the withheld commissions that XL Specialty had agreed to pay Benfield for servicing the treaties Carvill had placed. After that deduction, the court awarded compensatory damages to Carvill in the amount of $4,037,066.21 - 90% of the unpaid commissions. *Id*. With the application of prejudgment interest and offer of judgment interest to which Carvill was entitled, the court entered judgment in favor of Carvill in the amount of $5,068,583.97.

The court then went on to consider XL

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The court reasoned that "the termination of the reinsured-broker contract did not have the effect of terminating the contract between the reinsurers and Carvill." Id. at *11. To the contrary, there was a "cognizable business relationship between Carvill and the reinsurers that survived the appointment of Benfield as the new intermediary."

The scope of Carvill's fiduciary duty was limited to acting on behalf of XL in the procurement and execution of the reinsurance program, and in that responsibility Carvill owed a fiduciary duty, both contractually and historically. Communications between the parties regarding the contractual responsibilities does not fall into the ambit of the fiduciary responsibilities of Carvill.

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Specialty's 11-count complaint, which alleged that Carvill had engaged in various forms of misconduct. The *XL Specialty* court ultimately rejected the vast majority of XL Specialty's claims. Some of the court's rulings on XL Specialty's claims are instructive as to the scope of a broker's duties in a post-termination context. For example, XL Specialty alleged that Carvill, after its termination as broker of record, breached its fiduciary duties by asserting in a letter to reinsurers that it was still legally entitled to brokerage commissions. The court held that Carvill's assertion of its perceived right to brokerage did not qualify as a breach of fiduciary duty. *Id*. at *25. The court found nothing untoward about Carvill placing reinsurers on notice that Carvill intended to enforce the agreements with the reinsurers as reflected on the slips. *Id*. at *25-26. As the court put it: "In the context of commercial reinsurance, asserting a right is certainly a fair practice, especially if the assertion is correct." *Id*. at *26.

After it was terminated, Carvill's counsel wrote to Benfield stating that any attempt by Benfield to deliver premium, collect brokerage or otherwise represent itself as being the intermediary of treaties placed by Carvill, without proper legal authorization, would constitute intentional interference with contract. Again, XL Specialty alleged that Carvill breached its fiduciary duties by this post-termination communication. *Id*. The court disagreed with XL Specialty, finding that XL Specialty and the reinsurers "had the obligation to change the intermediary clauses in the treaties if they were technically to act according to the contracted framework." *Id*. Viewing Carvill's letter to Benfield as "Carvill's attempt to avoid being cut out of the process," the court concluded that there was "nothing unfair about reminding the others about the advisability of amending the contractual provisions to reflect the new reality." *Id*. Later, in its opinion, the court also rejected XL Specialty's claim that Carvill's letter to Benfield amounted to tortious interference with XL Specialty's contractual relations. *Id*. at *32.

These particular rulings are somewhat fact-specific, but in rejecting yet another XL Specialty claim, the court reached a more broad-based conclusion about post-termination communications between reinsurance brokers and their former clients. Again in support of its breach of fiduciary duty claim, XL Specialty complained about statements made in a letter from Carvill to one of XL Specialty's executives concerning Carvill's views on its contractual right to brokerage. *Id*. at *62. In rejecting XL Specialty's claim, the court observed:

> The scope of Carvill's fiduciary duty was limited to acting on behalf of XL in the procurement and execution of the reinsurance program, and in that responsibility Carvill owed a fiduciary duty, both contractually and historically. Communications between the parties regarding the contractual responsibilities does not fall into the ambit of the fiduciary responsibilities of Carvill.

Id.

The XL Specialty court did not reject all of XL Specialty's claims; it found two technical breaches. First, the court found that Carvill breached the BOR by failing to provide a periodic accounting of brokerage commission paid to Carvill, notwithstanding the custom in the industry that intermediaries do not report commissions unless specifically requested. *Id*. at *16-21. Second, the court found that after its termination, Carvill breached its fiduciary duty by its tardy transfer of XL Specialty account information to the replacing broker. *Id*. at *27.

Turning to damages arising from these breaches, the court found that XL Specialty was not harmed by Carvill's failure to provide the periodic accounting required pursuant to the BOR because it had been otherwise entirely satisfied with Carvill's services until immediately prior to the termination.[iii] *Id*. at *39. "Where there are no discernable damages, there can be no recovery of anything but nominal damages," which the court awarded to XL Specialty in the amount of one dollar. *Id*. Similarly, with respect to "the sluggish transfer of documents" to the replacing broker, the court found no credible evidence of pecuniary damages. *Id*. Because the court found that the "defalcation was not serious, caused no specific harm and was not performed to benefit Carvill at the expense of XL Specialty," the court again awarded nominal damages to XL Specialty. *Id*. at *41.

The State of the Law

Following the decisions in *Benfield v. Moline* and *XL Specialty v. Carvill*, there is now at least some guidance for reinsurance brokers with respect to their rights and obligations with respect to compensation for their services.

Brokers Are Paid by Reinsurers

The *Benfield* and *XL Specialty* courts both confirmed that reinsurance brokers are paid by the reinsurers. The Benfield Court came to this conclusion based on custom in the industry, while the XL Specialty Court reached this conclusion based on the contract between the brokers and reinsurers embodied in the slip.

Throughout the course of the *XL v. Carvill case*, XL argued that because Carvill's brokerage commission was deducted from reinsurance premiums paid by XL, it was XL that "really" paid the commissions. The court found that the superficial appeal of this position "does not change the nature of the commission as being directly paid by the reinsurers, as reflected in the fundamental contracts and the accounting procedures." *Id*. at *34 fn.34; *see also* *36. The court's reference to accounting procedures relates to evidence introduced at trial which established that, under the general accounting principles and procedures promulgated by the National Association of Insurance Commissioners ("NAIC"), reinsurers are required to report reinsurance brokerage as an expense on their statutory financial statements. Carvill argued that the NAIC rule reflected the industry's recognition that reinsurers bear the financial burden of paying brokerage commissions. The court agreed. *Id*. at *34 fn. 34.

Brokerage Is Earned on Placement

The *Benfield* and *XL Specialty* courts both held that brokerage is earned on placement notwithstanding the fact that the broker is committed to service the business until the last loss is paid.

In *Benfield*, the court concluded that "the general rule for insurance brokerage commissions applies to the reinsurance industry: generally, reinsurance brokerage commissions are earned at placement; if the client switches brokers partway through the insurance contract year, the initial broker is still entitled to those commissions until the treaty renewal period." Because the court had not been provided with the relevant contractual documents, the *Benfield* court's decision in this regard was based on (i) the evidence of custom and practice that had been presented to the court in the form of affidavits submitted in support of and in opposition to Benfield's motion for summary judgment and (ii) the line of cases holding the same in the primary insurance context.

In *XL v. Carvill*, the court reached the same conclusion although with the benefit of the relevant contractual documents. The court rejected XL Specialty's argument that brokerage is earned over the course of the broker-client relationship, such that XL Specialty's termination of Carvill partway through the contract term would cut off Carvill's right to a commission on premiums paid after the date of termination. In so holding, the court emphasized that "there is nothing in the language of the contracts to compel the conclusion that termination of the contract between XL and Carvill perforce terminates the contracts between Carvill and the reinsurers." *Id*. at *10.

Although the *XL Specialty* court took note of the primary insurance cases and the *Benfield v. Moline* decision in reaching its decision that the reinsurance brokerage commission is fully earned upon placement, the court placed the greatest weight on the language of the three contracts at issue, as well as expert testimony that the commission was paid by reinsurers as consideration for receiving the business from the broker. *Id*. at *9-10. "I credit the evidence suggesting that the reinsurers paid the commission for providing the business; so long as the reinsurers received premium payments, a percentage of that premium was owed to Carvill by the clear and unequivocal language of the slip. *Id*. at *10.

By this holding, the court also affirmed the proposition, advocated by Carvill, that reinsurers pay brokerage for the production of business to them by the placing broker. *Id*. at *9-10.

The *Benfield* and *XL Specialty* courts both held that brokerage is earned on placement notwithstanding the fact that the broker is committed to service the business until the last loss is paid.

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It therefore remains to be seen whether a clear trend will emerge among the courts - providing further clarity to reinsurance brokers as they attempt to balance the work that they do for their clients with their right to be compensated by the reinsurers with whom they place the business.

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The Scope of the Fiduciary Relationship

It is generally accepted that reinsurance brokers act as the agent of the reinsured company and are therefore subject to the law governing the responsibilities of an agent to its principal.[iv] One of the arguments that XL Specialty made in the *XL Specialty v. Carvill* case was that Carvill owed XL Specialty certain fiduciary duties with respect to its negotiation of the terms of its compensation by reinsurers. In response, Carvill argued that the negotiation of its compensation was outside of the scope of the duties it owed to XL, as evidenced by the explicit language in the BOR, which provided that Carvill's remuneration was to be paid by reinsurers and not XL.

While the *XL Specialty* court dealt factually with (and rejected) XL Specialty's contention that Carvill's "commission structure" adversely affected XL Specialty's reinsurance program, the court never addressed whether a reinsurance broker's fiduciary duties extend to the broker's negotiation of its compensation with reinsurers. *Id*. at *28-29.[v] The court clearly held, however, that the fiduciary duties owed by a reinsurance intermediary to its client are not boundless:

> The fiduciary duty in the reinsurance broker context cannot require that the broker 'put the interests' of the ceding client ahead of its own in every conceivable way. To take the position to its logical absurdity - that a broker has the legally enforceable obligation to charge the least amount that a hired expert in hindsight thinks is fair - is to ignore the practical realities . . . and to substitute the subjective view of the reviewing court for the contractual realities.

Id. at *29. Thus, the court made it clear that, in its view, the broker has at least some right to look out for its own interest in the course of negotiating the terms of its compensation by reinsurers - the true extent of that right remains to be determined.

Conclusion

The *Benfield v. Moline* and *XL Specialty v. Carvill* cases are the first decisions to provide any real guidance to reinsurance brokers as they seek to negotiate the terms of their compensation or to enforce their right to compensation following termination by the ceding company. These decisions are significant in that they are the only reported decisions in the United States directly addressing these important issues. The decision in the *XL Specialty* case is particularly noteworthy as it was the culmination of a five week trial in which all of the relevant contracts and customs and practices were carefully considered by the court. There are, however, several other cases pending at the moment in which some of these same issues are being considered by other courts. It therefore remains to be seen whether a clear trend will emerge among the courts - providing further clarity to reinsurance brokers as they attempt to balance the work that they do for their clients with their right to be compensated by the reinsurers with whom they place the business. ▼

i Subsequent to the court's decision, Collins filed a motion for reconsideration seeking to introduce certain contract provisions that it claimed "address[ed] ownership of the brokerage commissions." *Benfield v. Moline*, 2006 WL 680591 (D. Minn. March 16, 2006). The court denied Collins' motion.

ii In the insurance context, there are numerous cases which hold that an insurance broker earns his commission upon placement of the insurance. *See, e.g., Underwriters Service, Inc. v. Aetna Casualty and Surety Co.*, No. 90C-MR-62, 1992 WL 9347, *1 (Del. Super. 1992); *Cockrell v. Grimes*, 740 P.2d 746 (Okla. 1987); *Commonwealth Ins. Dept. v. Safeguard Mutual Ins. Co.*, 336 A.2d 674, 685 (Pa. 1975); *Arizona Ins. Guaranty Ass'n v. Humphrey*, 508 P.2d 1146, 286 (Ariz. 1973); *Boro Hall Agency v. Citron*, 329 N.Y.2d 269, 270 (NY 1972).

iii The Court found that XL terminated Carvill because it refused to share its commissions with XL. (*Id*. at 20, 24-25.)

iv *See* Gordon S. Staring, Law of Reinsurance §7:2 (2005).

v In its negligence count, *XL Specialty* repeated its allegations about the adverse affect on XL Specialty of Carvill's "commission structure." XL Specialty at *33. The court observed that "not all of the actions of Carvill took place in its role as a fiduciary." *Id*. The court continued: "To the extent that its setting of its own fees and commission may be considered to be outside the fiduciary context, I nonetheless find that XL has not proved that, even if there was a duty to XL regarding the size of the fees, any duty was breached . . ." *Id*. These comments confirm that the court did not decide whether a reinsurance broker's fiduciary duty to its client extends to the arrangement of its compensation.