In the Matter of the Arbitration Between

The Garn Group, Inc.

Petitioner,

- and -

Arch Insurance Company

Respondent

PANEL

Mary Ellen Burns, Umpire
Douglas C. Moat, Arbitrator
Edwin M. Millette, Arbitrator

FINAL AWARD

The undersigned, being the duly constituted Panel of arbitrators in this matter, after considering the evidence and arguments presented by the parties, after conducting live hearings on October 30, 31 and November 1, 2006, during which witnesses appeared before the Panel for examination and cross-examination, after having heard closing arguments on November 1, 2006, and having considered pre-hearing briefs, deposition transcripts, motions, arguments and other submissions by the parties, hereby issues this **AWARD** as follows:

1. The panel, by a majority, finds that the Garn Group failed to establish that it was entitled to the damages it sought and therefore, denies the demands of the Garn Group (the "Agency") in their entirety.

2. The panels denies the demands of the Arch Insurance Company ("Arch"), in their entirety.

The panel notes that this order does not change the respective rights and obligations of the parties set forth in the documents herein, with respect to future reporting requirements.

So ordered this 7 day of December, 2006.

Mary Ellen Burns

Mary Ellen Burns, Umpire,

Edwin M. Millette

Ed Millette, arbitrator

Douglas Moat, arbitrator, dissenting.

In the Matter of the Arbitration between:

THE GARN GROUP, INC.

V.

ARCH INSURANCE COMPANY

Mr. Moat, dissenting.

A primary purpose of arbitration is to have issues resolved by individuals familiar with those issues, in this case people familiar with insurance industry agency/company custom and practice. Furthermore it is not unusual for one or more panel members to be lawyers so that both the arbitration process and the panel's decisions reflect applicable law. The decision of the panel fails to adequately consider and apply usual custom and practice in the industry and, as expressed in our deliberations, is based on a faulty application of the law. Thus, this dissent.

THE FACTS

The basic facts of this situation are clear. The Garn Group, LLC ("Garn") and First American Insurance Company, subsequently Arch Insurance Company ("Arch") entered into a producer agreement (the "Agreement") with respect to Garn's equine liability program (the "Program"). The Agreement had been prepared by Arch and was, typical of such agreements in the industry, essentially non-negotiable. On review, it imposed no duties on Arch other than to pay commissions for business submitted and provide standard hold harmless assurances. Importantly, the Agreement stated that the parties were to submit all disputes between them to arbitration and that Missouri law would apply. The Agreement required Ms. Lisa Garn ("Ms Garn") to sign a personal indemnity for funds due by Garn to Arch. Complementing the Agreement was a Letter of Intent signed by Garn, Arch and Arch's 100% reinsurer (the "Letter of Intent") that gave Garn a share of profits on all business covered by the Agreement and the reinsurance treaty. Arch, consistent with the termination provisions of the Agreement, gave notice of termination to be effective at the end of December 2002. Subsequent to being notified of the termination, Garn sought a meeting to request an extension in order to have time to obtain a new carrier. The meeting was delayed until December at which time Garn's request was denied. Sometime during 2003 Garn started placing its Program business with another company. During the term of the Agreement Garn's premiums for the Program increased annually from $788,142 to $1,400,984. During 2003 the premiums on Garn's business diminished to $327,133, a 77% decrease.

Subsequent to the termination, Garn and Arch were unable to reconcile the accounts between them. Garn withheld a portion of premiums claiming that Arch failed to account to it for sums due to Garn, and failed to provide Garn with loss and other required reports. In mid-2005 Arch sued Ms. Garn personally in New York Supreme Court under the terms of the personal guaranty. Looking to the guaranty and apparently not to any other agreement and relying on New York law, the court rendered judgment for Arch for premium amounts due by Garn. Such amounts were subsequently paid in full. At the same time, the court remanded Arch's request for fees and expenses to a magistrate. A stipulation between the parties suspends the fee issue until resolution of the arbitration.

In November 2005 Garn made a demand for arbitration alleging Arch's failure, inability or unwillingness to provide information customary to assisting an agent in seeking a replacement insurance carrier, plus a calculation determining Garn's interest in the profits of the Program and seeking monetary damages including the cost of the arbitration and the lawsuit. Arch seeks recovery of its costs in the arbitration.

THE BASIC ISSUE

Although Garn raised a number of instances of alleged failures on the part of Arch, the basic issue before the Panel was simple:

> *Garn claims that Arch did not, would not or could not provide it with data necessary to make a timely and effective presentation to substitute carriers. As a result, it was damaged.*

One or more members of the panel determined that: i) Arch had minimal, if any, obligations to Garn beyond the terms of the Agreement; ii) Garn failed to provide sufficient testimony to show otherwise; and, iii) had there been a finding of liability, Garn's claims should be denied because it failed to mitigate its damages. Accordingly, a majority of the panel has determined that the Petitioner's demand for damages should be denied. Claims for costs of both parties are also denied. The reasoning for this decision does not reflect the customs and practices of the industry and is wrong under the law.

INDUSTRY CUSTOM AND PRACTICE

It is recognized custom and practice in the insurance industry that an agency seeking to place business with an insurance company, especially program business, needs extensive historic premium and loss experience from any and all predecessor carriers – not least, the most recent data from the most recent carrier. The failure to have such data is a considerable impediment to the timely acquisition of a replacement carrier. A majority of the panel fails to understand and apply insurance agency/company custom and practice as it applies to three distinct areas affecting the petitioner's claims as to this issue.

Accordingly, the majority arrive at incorrect conclusions as to each of the following determinations.

1) The Defendant had no obligations beyond those expressly enumerated in the Agreement.

2) The Petitioner, knowing that timely, detailed loss data was, or could be, important, should have negotiated this fact into the Agreement.

3) The Petitioner could have, and should have, sought the information from alternative sources.

The Defendant Arch did in fact recognize that it had obligations beyond those expressly enumerated and the panel should look at all such duties whether implied by the contract, industry custom and usage, or both. Unequivocally, if the panel is to determine that Arch failed Garn in some manner then it must first look to the Agreement where the obligations of the parties can be expected to be spelled out. A review of this Agreement indicates that Arch had no express obligations to Garn other than to pay commissions and offer certain hold harmless assurances.[1] On the other hand, Arch itself recognized that it had implied obligations. For instance, for Garn to issue policies on behalf of Arch, it was necessary for Arch to file such forms and rates as were to be used by Garn with various state regulatory authorities. Arch did this.[2] Also, the Letter of Intent[3] states that the Program is "underwritten and administered by Garn on behalf of First American", and that to recognize Garn's interest in the long range profits of the Program it (Arch) entered into the agreement "...under the utmost good faith."[4] The fact that Arch performed activities implied by the Agreement, and specifically agreed to support the Program under the Letter of Intent, it is reasonable to look also to custom and practice for any other obligations that may have existed between the parties. Most significant among these was that of maintaining and providing detailed loss data on a regular basis and making such information available to its agents.

It is unreasonable to suggest that Garn should have to, or could, negotiate for loss data as a part of the Agreement. At the crux of the petitioner's case is the claim that Arch would not or could not provide detailed loss data that was necessary in a timely manner when Garn commenced its efforts to find a replacement insurance company. The panel has suggested that because such information was recognizably important that the petitioner should have sought to negotiate its availability as a part of the contract. This is unreasonable for three reasons. First, it is common knowledge to any person experienced in the insurance agency/company field that few, if any, agents, particularly those the size

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[1] Exhibit 7

[2] Transcript, Woyden testimony, Page 383, 387,401 and 422

[3] Exhibit 8

[4] Exhibit 9

of Garn, have succeeded, or even expect to succeed, in having companies, whether "fronting" companies or otherwise, revise their standard producer agreements to accommodate their desires. Were companies to accede to contract revisions for even a small number of their agents, who often number in the thousands, it would create an administrative nightmare. Second, all primary companies are required to maintain detailed loss data in order to meet statutory reporting requirements[5] [6] and such data is regularly provided to agents. Third, Arch had agreed to support the Program by signing the Letter of Intent. Thus knowing that Arch would or should have such data, it was reasonable for Garn to expect that it would be provided to it regularly, consistent with industry custom and practice.

The Defendant Arch was the only source of all detailed loss data. It was suggested to the panel that Garn need not rely on Arch for the data it required because it had access to such information from either or both the third party handling the claims ("TPA") and the reinsurer. Such however is not correct. The TPA, deprived of control over the final disposition of some cases[7] and lacking information regarding IBNR calculations, would not have complete data and reinsurers, even 100% reinsurers, who do their own reserving relying on premium and paid loss data, are not always given timely notice of the status of all reported claims. Also, as Mr. Hestwood[8] testified successor carriers want to see the loss data from their predecessor, not from the agent or any third party.[9] Thus, Arch was the only source from which Garn could expect to receive the data it needed. The problem of availability appears to have been exacerbated by Arch's inability or difficulty in developing or providing that information to the interested parties. Ms. Garn testified that Arch consistently failed to provide loss data "on any regular basis unless we jumped up and down and yelled for it. And then occasionally we would get some."[10] Hestwood further testified "The Accounting Department in AmRe Brokers would contact me on occasion because they tracked every account. They would say we don't have it (the information from Arch). Where is it? Go track it down."[11] Ms Garn went on to testify that in order to prepare a proposal book as an aid to describing her Program to a potential replacement carrier she had to "base (the Arch incurred loss data) on the best information that was made available to me at sporadic times."[12] Other than data provided in February

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[5] Detailed loss and loss expense data is maintained by the insurer to meet the requirements of its statutory filings.

[6] See also, Transcript, Woyden testimony, Page 400 line 11

[7] Transcript, Dudzik testimony.

[8] Hestwood, testifying for Garn, was the reinsurance broker who represented Garn at the signing of the Agreement and in the negotiations for the reinsurance.

[9] Transcript, Page 314

[10] Transcript, Page 64, line 16

[11] Transcript, Hestwood Testimony, Page 375 line 15

[12] Transcript, Page 65,line 20

2004,[13] a full year after it was needed, Arch offered no rebuttal to the claim that they did not, could not or would not provide the necessary loss data that was basic and available to them.

Although the Program premiums were increasing rapidly, Arch's testimony is that the Program was too small and didn't represent a class of business that it wanted to continue to underwrite – notwithstanding that it expected to incur no underwriting risk. By its own calculations, Arch indicated that the Program was at that time generating an underwriting profit in which Garn was entitled to share.[14] Under such circumstances, many companies are willing to extend limited concessions to the producer to enable it to minimize the expense and embarrassment of non-renewal and / or cancellation notices. This was both the experience of Mr. Hestwood and the expectation of the parties as they awaited a meeting with Mr. Clark.[15] Such an expectation seemed particularly reasonable since Arch expected no underwriting risk as a result of reinsuring the program 100%.[16] Notwithstanding that it delayed a meeting of the parties until virtually the last minute, Arch refused to grant any concessions to Garn.

The testimony indicates that following receipt of the notice of termination Mr. Hestwood began looking for a replacement carrier[17] and Ms. Garn "... had conversations with Mr. Hanrahan and we both had conversations with Mr. Clark."[18]

Garn presented contemporary testimony that Arch failed to provide it with any assistance, including providing loss runs and other reports, and that these failures severely hindered Garn's ability to secure a new carrier. Arch presented no contemporaneous testimony or documentary evidence to the contrary.

THE LAW:

The decision of the majority of the panel fails in the application of the law in at least two respects:

1) The petitioner Garn presented prima facie evidence of all the basic elements of its case. Arch offered no evidence to rebut the petitioner's claims. Under such circumstances, the petitioner's case should prevail as a matter of law.

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[13] Exhibit 22

[14] Exhibit 45

[15] Transcript, Page 76, line 19

[16] See Exhibit 9

[17] Transcript, Page 161, line 5

[18] Transcript, Page 72, line 9

2) The petitioner Garn presented prima facie evidence of its efforts to find an alternative carrier during the notice-of-termination period and its success in doing so shortly after the effective date of the termination. This would seem evidence enough of an attempt to mitigate. Arch offered no evidence suggesting that Garn could have or should have done more. The panel majority is wrong to question why Garn did not do more.

No matter the jurisdiction, it is axiomatic that once the proponent of a position presents a prima facie case the burden of proof shifts to the opposing party. In this case, Garn not only presented a prima facie case, but also presented independent corroborated testimony of all the basic elements of its case. Arch offered no contemporaneous testimony or documentary evidence to rebut Garn's claims. Therefore, Arch failed to meet its burden of proof, and Garn should prevail as a matter of law. However, the majority of the panel failed to recognize and apply this basic rule of evidence. [19]

On the issue of mitigation, New York and Missouri law are reasonably consistent in that: i) there is no requirement for mitigation before the breach occurs; ii) mitigation is an affirmative defense, placing the burden of proof on the party seeking a reduction of damages; and, iii) arguments for mitigation give rise to facts that can be considered when establishing damages but do not, per se, abolish damages.

Thus, any finding that Garn could have, or should have, taken steps during the termination notice period, beyond a singular attempt to find an alternative carrier and attempting to set up a meeting at which it expected to negotiate an extension, are irrelevant regarding the issue of mitigation. The evidence shows that during the year immediately following the effective date of the termination, Garn succeeded in finding a substitute carrier and commenced placing business with it even without Arch's assistance. Thus, it is evident that Garn moved reasonably expeditiously to lessen any damages that it might have experienced. No contemporary witness or documentary evidence was presented by Arch to suggest that Garn could have, or should have done more. Therefore, any measure of damages must be related to the loss of business sustained by Garn following the date of termination.

SUMMARY

The evidence shows that Garn lost considerable business after the Arch termination, and Arch's actions and inactions contributed to that loss. However, the majority of the panel has determined that Arch should not be held accountable for its failures. Such a result is inconsistent with the customs and practices of the insurance industry and wrong as a matter of law.

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[19] For instance, the panel majority questioned why, even though Garn presented testimony that was corroborated by Mr. Hestwood, Garn did not present e-mails to confirm the requests for reports and loss runs. This is a curious position given the fact that Arch presented no rebuttal of key points at all.

Even if a majority of the panel believes that mitigation is a basis for totally denying damages to Garn, then at the very least the parties should be given an opportunity to brief the panel on the applicable law.

By the terms of the letter of intent, Garn has an ongoing interest in the profitability of the business that has been placed with Arch and fully reinsured. Although the order of the panel majority recognizes that interest and attempts to protect it, the order effectively removes any means for Garn to enforce that interest.

Even though the court has ordered Arch's claim for fees and expenses in the lawsuit on the guaranty be reviewed by a magistrate, under the stipulation between the parties the panel is not precluded from commenting on the merits of the claim and observing the discrepancy between the law applied and that required by the terms of the Agreement.

For all of the foregoing reasons, based on the clear record before the panel, I dissent from the majority's award.

Signed:
Douglas C. Moat