WHAT'S IN A NAME? WHEN PROFIT SHARING "INSURANCE" IS NOT INSURANCE UNDER THE *INSURANCE ACT*

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In a recent trial win for McMillan, the Ontario Superior Court in *Victess Capital Corp. v. Intact Insurance Co.*[1] rendered a decision that sheds light on the definition of insurance under Section 1 of the *Insurance Act* (the "**Act**"). The decision confirms that an option to lock-in a broker's profit share does not constitute insurance under the Act, notwithstanding that the insurer may explicitly refer to the program as profit share "insurance".

Background

The plaintiff was a broker representing the defendant, Intact Insurance Company ("**Intact**"). The two parties entered into a profit sharing agreement (the "**Broker Profit Sharing Agreement**"). Profit sharing programs allow brokers who meet a minimum amount of profitability to earn a bonus based on the amount of business the broker brings to the insurer.

Under the Broker Profit Sharing Agreement, the plaintiff could elect the "Nine-Month Option", which allowed brokers to lock-in their profit share for the year as of September 30 for a fee of 15% of that profit share. This guaranteed that if the broker's profit share decreased after September 30, the broker would take home the higher September 30 profit share amount at the end of the year.

In November 2012, Intact sent a letter to the plaintiff asking if it wanted to elect the Nine-Month Option and lock-in its profit share as of September 30, 2012 (the "**Letter**"). Along with the Letter, Intact sent the plaintiff a profit share statement as of September 30, 2012, showing the plaintiff's profit share as being approximately $90,000. The plaintiff elected the Nine-Month Option.

In December 2012, Intact discovered that it had made a calculation error and that the profit share statement provided to the plaintiff was incorrect. In fact, the plaintiff was only entitled to a profit share of approximately $24,000.

The Plaintiff's Claims

The stand-alone contract argument

The plaintiff brought an action against Intact seeking to recover the difference between the two profit share amounts, arguing that the Letter constituted a new, independent contract that Intact breached when it only paid the defendant the correct profit share amount of $24,000, rather than the $90,000 (minus the 15% fee) referred to in the Letter.

The contract of insurance argument

At trial, the plaintiff amended its statement of claim, pleading that this new stand-alone contract was a "contract of insurance" pursuant to the Act. The plaintiff argued that, by electing the Nine-Month Option, it was insuring itself against the occurrence of further claims in the fourth quarter that might cause it to lose profit.

The plaintiff took the position that, since the Letter was a contract of insurance under the Act, pursuant to Section 124 of the Act, no term of the contract that was not in the Letter was admissible into evidence if it would prejudice the plaintiff. As such, the plaintiff argued, the provision in the Broker Profit Sharing Agreement which gave Intact total discretion on the final determination of any disputes relating to calculations, including profit share calculations, ought to be excluded from evidence.

The court's findings

No stand-alone contract of insurance

The court held that the Letter was not a stand-alone contract and that there was no separate offer contained within it.

The court also found that the Letter could not be construed as a "contract of insurance," as defined in the Act, since it did not meet the definition of "insurance" under Section 1 of the Act. According to the court, the option to elect the Nine-Month Option in the Broker Profit Sharing Agreement did no more than provide an optional alternate means of calculating the plaintiff's entitlement to a "bonus".

The option to lock-in the plaintiff's profit share as of September 30 was not providing the plaintiff with "insurance" against losses or liabilities arising from claims made by others. The court noted that the plaintiff could *never* be at risk of suffering a "loss" as a result of electing the Nine-Month Option, as any such "loss" being "insured" against was inherent in the nature of the right that the plaintiff enjoyed under the Broker Profit Sharing Agreement.

The court made this finding notwithstanding the fact that Intact referred to the Nine-Month Option as profit share "insurance" and "bonus insurance" in the Letter and in the enclosed profit share statement. According to the court, the colloquial use of the word "insure" or "insurance" did not alter the analysis that this was not, in fact, insurance.

Defendant's entitlement to rectification

In holding that the plaintiff was not entitled to the difference between the profit share cited in the Letter and the correct amount of $24,000, the court held that the plaintiff likely knew or ought to have known that the profit share amount referred to in the Letter was too good to be true. The court confirmed that, even if the Letter were found to be a stand-alone contract, the court would have no hesitation in applying the doctrine of rectification to avoid conferring a windfall upon the plaintiff seeking to take advantage of Intact's error.

Key takeaways

Insurers can take comfort in the fact that they are not unwittingly offering policies of insurance to brokers through their broker profit sharing programs. The definition of "Insurance" under the Act is clear and narrowly-defined. Even if an insurer colloquially uses the language of insurance to describe a program, if the program does not comply with the strict definition of insurance under Section 1 of the Act, the Act will not apply.

by Ben Bathgate and Cara Zacks

[1] 2016 ONSC 7838[ps2id id='1' target=''/]

A Cautionary Note