12.2 Blanket Broker of Record Letters.

In addition to seeking its own customer records and data, Capitol, asked CMM to sign, jointly with Capitol, Blanket Broker of Record Letters (BBRL) to insurers which were providing insurance to Capitol's clients. The purpose of such letters was to jointly inform each such carrier that Capitol was separating from CMM and that Capitol, not CMM, would be the broker of record, i.e. the firm recognized by the insurance carrier as the insured's broker for the insurance written by the carrier. Capitol wanted such letters to be "blanket" letters, meaning that a single such joint letter from CMM and Capitol to a single insurer would request and authorize the change, at the insurer, of the identity of the broker of record from CMM to Capitol for all persons and entities insured by that carrier with the broker of record listed as CMM. Such a blanket letter would provide to the insurer all necessary data respecting each and every person or party insured and the policies issued to them by the subject insurance earner.

The efficiency of listing all such insureds in one joint blanket letter is obvious. The alternative, and less efficient method of effecting the necessary change of the broker of record was to prepare a separate letter for each and every insured and to attach thereto the data for that single insured and to send that individual broker of record letter (IBRL) to the subject carrier. Instead of using one blanket letter for each insurance carrier, individual letters would be needed for each and every insured.

CMM insisted that only individual not blanket, broker of record letters could be signed by CCM. With its access to the necessary data on its database, CMM could have prepared and signed BBRL readily as requested by Capitol. Instead, by insisting on individual letters and simultaneously blocking Capitol's access to the data necessary for the preparations of such letters, CMM substantially interfered with Capitol's efforts to move its business out of CMM as

a viable business.

Of course, the more difficult and more time consuming it was for Capitol to move a client out of CMM, the greater the opportunity was for CMM that the insured might never move with Capitol.

The Agreement did not directly address this matter of broker of record letters but did provide that Capitol owned all of its customer records and data, owned its own Book of Business, and could terminate its relationship with CMM at any time. I therefore find that the clear intent of the Agreement was that CMM cooperate in facilitating the transition of Capitol's Book of Business to Capitol upon its termination of the Agreement and that CMM act reasonably in so doing.

CMM defends its refusal to sign joint blanket broker of record letters by claiming that execution of BBRL by CMM would expose CMM to errors and omissions liability claims by the insured's involved. This squarely posed the issue of whether or not Capitol's request for BBRL was reasonable and whether CMM's refusal to provide them was not. Both parties offered expert testimony on this key issue. Both Capitol's expert, Mr. Fred Fisher and CMM's expert, Mr. Andrew Barile are very experienced and qualified, generally, in the insurance industry. Mr. Fisher had more qualifications and experience directly applicable to the issue of BBRL in the context of this dispute.

Mr. Fisher had impressive credentials and testified confidently, knowledgeably and articulately about BBRL. He said that BBR letters are not common because the situation of a broker leaving one firm and taking his insurance customers with him or her is not a common occurrence. However, he said such letters are appropriate and acceptable and are used in the industry in such situations. .Mr. Fisher's testimony was clear persuasive and had the virtue of comporting with common sense.

CMM's expert on BBRL, Mr. Barile, was familiar with the insurance

business at a very high level, but he had very limited knowledge and experience with BBRL as of 2009, the relevant year. Whereas Mr. Fisher was very familiar with such letters and knew that they are used and accepted, Mr. Barile appeared to be unfamiliar with BBRL and gave his personal opinion that such letters would not be appropriate or acceptable. This gentleman's testimony was not persuasive when compared to Mr. Fisher's testimony.

Both parties offered executives from various insurance companies to testify to their company's policy respecting the use of BBRL. Some accepted them. Some accepted them with conditions or qualifications. Whether a particular carrier does or does not accept BBRL and under what conditions is not the issue. If they are commonly accepted, as Mr. Fisher testified, and CMM had no good reason to decline to provide them, the fact that a given carrier might not accept such letters under certain circumstances is not dispositive. If CMM had a duty to sign BBRL, such a carrier could then have declined to accept the letter. So the question is whether CMM had a good reason to decline to sign BBRL.

Apart from its expert, Mr. Barile, CMM offered testimony from its president and CEO, Herb Rothman and from its attorney, Mark Robinson. On this issue, Herb Rothman testified that he had no prior experience with BBRL. He testified that BBRL, as he understood them, posed a risk to CMM for liability to its insureds for errors and omissions. His explanation of that risk was confusing and not persuasive. His credibility was called into question here because he is an attorney and CEO of a firm that sells liability insurance. If there is such a liability exposure from BBRL, Mr. Rothman did not articulate it and his testimony was unpersuasive as compared to that of Claimant's expert Mr. Fisher.

Attorney Mark Robinson, CCM's attorney and a partner in the firm, that represented CCM in this arbitration, testified about the BBRL and attempted to explain the liability risk he considers are inherent in the use of such letters. Again, it

was not made clear to the Arbitrator how there was a legitimate and realistic concern for third party errors and omissions exposure with BBRL. However, other testimony provided by Mr. Robinson was more important on this issue. At the end of his testimony, Mr. Robinson testified that BBRL could be used to obtain the consent of the insurance carrier to a transfer of business if the parties involved (Capitol and CMM by implication) had an agreement between them stating representations and warranties and providing indemnification for third party liability. With an agreement like this, such as is used, he testified, in asset transfers, BBRL could be used. Attorney Robinson further testified that no request had been made by or on behalf of CMM to Capitol to sign such an agreement in response to Capitol's request for BBRL. It was thus established that CMM could, indeed, have signed BBRL as requested if CMM had solicited an indemnity agreement from Capitol. There was no evidence that Capitol would have refused to sign such an agreement.

Consequently, while CMM did not prove its claim that it had reason to be concerned about an errors and omissions liability exposure with BBRL, its attorney who had represented it during the Capitol transition, explained how that alleged risk could have been easily handled. Here again, CMM is seen to have been uncooperative with Capitol. Either the alleged risk of third party liability from BBRL was not a legitimate concern or if it was indeed legitimate or CMM believed it was, CMM's failure to provide the simple solution of a hold harmless agreement established a lack of cooperation.

Based on the evidence, T find that CMM had no interest in providing BBRL to Capitol, whether or not Mr. Rothman was familiar with them and that CMM did not, pursuant to its duty of cooperation, avail itself of the assistance of its counsel to facilitate BBRL with Capitol by proposing a hold harmless agreement, if same was needed.

CMM also argued that it was possible that Capitol did not have

"appointments" with all the insurance carriers that would be receiving the requested BBRL. An appointment here is prior approval from the carrier that the broker may act for that carrier. CMM did not, however, establish that any harm or problems would ensue should there be any such lack of an appointment. The evidence established that an insurer would not change the broker of record without having in place at the insurance carrier an agency appointment for the broker seeking to become the broker of record. It was not for Mr. Rothman and CMM to decide, unilaterally, that since they did not know if Capitol had appointments with all carriers involved, that CMM would not sign the BBRL. The import of the evidence was that if in fact an appointment with a given carrier was lacking, such an appointment would have to be arranged before the change requested in the BBRL would be effected.

Capitol also proved that CMM had failed to act reasonably in its communicating promptly and constructively with Capitol during the transition period with the result that Capitol was frustrated rather than assisted in its efforts to accomplish what should have been a relatively simple transfer for its business. It is notable that there was no evidence of any similar difficulties experienced by Capitol when it brought its Book of Business *into* CMM.

13. Credibility of Witnesses

As noted above, Mr. Rothman lacked credibility in his testimony about BBRL. Given his experience, legal training and sophistication in the insurance industry, it is not credible that he was unfamiliar with BBRL and, giving him the benefit of a doubt on that issue, he was not credible in his explanation of why he declined to sign such letters for CCM once he understood what they were.

Gensar had some credibility issues and had to correct his testimony from time to time. His errors call into question his reliability for accuracy of detail which

negatively affected some of his damage claims. His credibility issues did not affect his evidence on the ultimate liability issues.

14. Findings on Liability of CMM

The foregoing and additional evidence which need not be reviewed here, establishes that Capitol has sustained its burden of proving its claim of conversion. By failing to promptly and reasonably act to deliver to Capitol its customer data and records and by failing to execute BBRL with or without a hold harmless and indemnity agreement, CMM converted Capitol's property and obstructed Capitol's efforts to exit CMM with its business intact.