

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 10-33653 CA 4

INSTITUTO NACIONAL DE SEGUROS,

Plaintiff,

vs.

HEMISPHERIC REINSURANCE GROUP, L.L.C.,
and HOWDEN INSURANCE BROKERS LIMITED,

Defendants.

THE ORIGINAL
FILED ON:
SEP 23 2010

IN THE OFFICE OF
CIRCUIT COURT DADE CO., FL

AMENDED COMPLAINT

Plaintiff Instituto Nacional de Seguros ("INS") sues defendants Hemispheric Reinsurance Group, L.L.C. ("HRG") and Howden Insurance Brokers Limited ("Howden"), and alleges as follows:

Nature of Action

1. This is an action for breach of contract (express and implied), negligence/broker malpractice, breach of fiduciary duty and aiding and abetting a breach of fiduciary duty against HRG and/or Howden, who were the brokers responsible for procuring reinsurance (which is also known as the "placement of reinsurance") on behalf of INS in connection with one of its underlying direct policies for the 2009-2010 policy year (the "INS Reinsurance Program").

2. As alleged below in more detail, HRG and Howden have wrongfully refused to reimburse INS for brokerage and premium that it overpaid in connection with the INS Reinsurance Program.

Jurisdiction and Parties

3. The damages in this action exceed \$15,000, exclusive of attorneys' fees, interest and costs.

4. INS is a Costa Rican state-owned insurance company with its principal place of business in San Jose, Costa Rica.

5. HRG is a Florida limited liability company with its principal place of business in Miami-Dade County, Florida. HRG is a broker engaged in, among other things, the business of obtaining reinsurance for insurance companies. Upon information and belief, HRG does not hold a reinsurance broker's license, as required under Florida's insurance laws, Fla. Stat. § 626.7492(3).

6. Howden is a company registered in England and Wales with its principal place of business in London, England. Howden is a broker engaged in, among other things, the business of obtaining reinsurance for insurance companies.

7. At the times relevant to this action, HRG and Howden acted as co-brokers for INS in connection with the placement of the INS Reinsurance Program pursuant to an express or implied contract between INS, on the one hand, and HRG and Howden, on the other hand.

8. In the alternative and even if there was no contract among INS, HRG and Howden, both HRG and Howden provided broking services to INS, with HRG acting as

the broker and Howden acting as a sub-broker for HRG. In their capacity as brokers for the INS Reinsurance Program and wholly independent of any contractual relationship, HRG and Howden owed INS a duty of reasonable care and a fiduciary duty.

9. This Court has jurisdiction over HRG, pursuant to Fla. Stat. § 48.193(1)(a), because it conducts business operations in the State of Florida and the causes of action alleged herein arose out of those activities. Moreover, upon information and belief, HRG committed tortious acts within Florida, so there is also jurisdiction over HRG under Fla. Stat. § 48.193(1)(b). In addition, this Court has jurisdiction over HRG, pursuant to Fla. Stat. § 48.193(2), because HRG engages in substantial activity in Florida.

10. Upon information and belief, Howden conducted business in Florida in connection with the placement of the INS Reinsurance Program by, among other things: participating in the preparation of materials sent from Florida to Costa Rica relating to HRG and Howden's request to provide broking services to INS; responding to requests from HRG to procure reinsurance for INS; sending representatives to Florida to meet with HRG regarding the INS Reinsurance Program; and sending communications to HRG in Florida with respect to the INS Reinsurance Program. Upon information and belief, Howden has conducted other business in Florida in addition to its activities relating to the INS Reinsurance Program, including, but not limited to, broking activities relating to the placement of other reinsurance for INS and the performance of certain broking services for HRG. Howden's affiliate, Howden Insurance LLC, engages in other insurance-related business in Florida and maintains an office at 9100 S. Dadeland Blvd, Datan 1, Suite 1500, Miami, Florida 33156.

11. Therefore, this Court has jurisdiction over Howden pursuant to Fla. Stat. § 48.193(1)(a). This Court also has jurisdiction over Howden, pursuant to Fla. Stat. § 48.193(2), because Howden engages in substantial activity in Florida.

12. Venue in Miami-Dade County is proper because HRG has an office for transaction of its customary business in Miami-Dade County and several of the various causes of action against HRG and Howden alleged in this Complaint accrued in Miami-Dade County.

13. Any conditions precedent to bringing this action have been performed or have been waived.

General Allegations

A. INS's Direct Insurance of ICE and Purchase of Related Reinsurance

14. As part of its operations, INS has for several years provided property damage and business interruption direct insurance coverage for Instituto Costarricense de Electricidad ("ICE"), the Costa Rican state-owned electricity and telecommunications supplier. INS has purchased reinsurance with respect to such coverage in the overseas markets. Reinsurance is protection — sometimes described as insurance for insurance companies — that direct insurers obtain in order to spread the risks covered in the policies they issue to their insureds.

15. In obtaining reinsurance for one of the ICE policies for the 2009-2010 policy year through the INS Reinsurance Program, INS used the services of HRG and Howden. Reinsurance brokers are typically compensated by the reinsured (*i.e.*, the direct insurer) through the payment of brokerage fees deducted from the gross premium

generated in the transaction. Here, HRG and Howden were paid their brokerage from the premium that INS paid, with the balance of the funds forwarded to the reinsurers. The brokerage fees can be calculated as a percentage of the premium or they can be a fixed amount. As a matter of law and custom and practice in the reinsurance industry, brokers act as the agents of the reinsured for the purpose of placing reinsurance.

16. As alleged below, the brokerage fee for HRG and Howden was an agreed-upon, fixed amount set forth in a contract among INS, HRG and Howden. HRG and Howden, however, breached the contract by, among other things, retaining more than the fixed amount of brokerage.

17. In the alternative and in the event there was no contractual relationship among the parties, HRG and Howden were owed a reasonable brokerage fee for the services rendered to INS, consistent with reinsurance industry standards, but instead they deducted an excessive amount as brokerage before passing along the remaining premium to the relevant reinsurers.

B. INS's Invitation to Tender

18. In early 2009, INS invited various brokers to bid for the placement of the INS Reinsurance Program, which relates to the ICE policy for the year 2009-2010. INS sent the brokers, including HRG, a document entitled "Invitation to Tender," which sets forth the mandatory terms for the placement of the INS Reinsurance Program. (A copy of the Invitation to Tender is attached hereto as Exhibit A.)

19. The Invitation to Tender requires brokers to submit a "binding quotation" (*id.* at ¶ 3) based on a fixed brokerage fee that could not be altered after the submission

of the proposal. The Invitation to Tender expressly states that “[t]he Brokerage Fee should be presented as a fixed amount” (*id.*) and further provides that: “The Broker shall not, under any circumstances, after submission of its Tender, modify the conditions of the proposal alleging lack of information or insufficient data regarding the Services, local conditions or inability to obtain data, under penalty of disqualification.” (*Id.* at ¶ 8.)

20. The Invitation to Tender further requires that the proposal from the brokers must include, among other things, the curriculum vitae of all key personnel providing services in connection with the INS Reinsurance Program and confirmation by the broker that it holds a valid E & O (errors and omissions) policy indicating the liability limit. (*See id.* at ¶¶ 3 and 8.)

21. Finally, the Invitation to Tender states that the selected broker is required to present documents known as “slips” (the “Reinsurance Slips”) to INS showing the amount of final premium to be paid to the reinsurers. (*Id.* at ¶ 3.)

D. The HRG Tender and Howden’s Role as Co-Broker

22. On or around February 15, 2009, HRG submitted its proposal (“the HRG Tender”) — which was a revision of its earlier proposal — for placement of the INS Reinsurance Program for the fixed brokerage fee of \$187,530 “[o]r for any other amount that might be established or agreed upon between the parties in accordance with the [Invitation to Tender].” (Copies of the Spanish version of the HRG Tender (as submitted by HRG), along with a certified English translation, are attached hereto as Exhibits B and C, respectively.) At no point did the parties agree upon a fee other than the \$187,530 quoted in the HRG Tender.

23. The HRG Tender made it clear that both HRG and Howden would participate in the placement of the INS Reinsurance Program. In discussing the prior experience in placing medium to large scale risks (as required by the Invitation to Tender), the HRG Tender refers to placements by HRG “along with Howden Insurance Brokers, Ltd.” (Ex. C at ¶ 3(c).) Even more importantly, the HRG Tender lists four Howden employees “as persons assigned to the placement of the account” and attaches their CVs. (*Id.* at ¶ 3(h).) The CVs of the Howden employees are listed before the CVs of the HRG employees, which illustrates the prominent role that Howden would play in the placement. Indeed, the HRG Tender emphasizes Howden’s experience in the London and global insurer market, which is significant given that the INS Reinsurance Program was placed in those markets.

24. Moreover, in satisfaction of the requirement in the Invitation to Tender that any proposal include confirmation by “the broker” that it holds a valid E & O policy, the HRG Tender attached evidence of both Howden’s and HRG’s E & O insurance. John H. Blake of HRG signed the HRG Tender and on that same page he describes the E & O insurance as “our professional indemnity policies.” (*Id.*) It is noteworthy that, upon information and belief, Neil Holden of Howden was one of the witnesses on the document where Mr. Blake collectively refers to “our” E & O policies. (*Id.*) Howden was also the broker for HRG’s E & O policy, which provides further evidence of the close cooperation between Howden and HRG.

E. HRG and Howden Place the INS Reinsurance Program

25. On April 2, 2009, INS instructed HRG to proceed with the placement of the INS Reinsurance Program in accordance with the terms of the HRG Tender (which, as noted above, clearly identified Howden as a co-broker). Although the Invitation to Tender contemplates that a successful tender would be converted into a contract document, no other contract documentation was completed for the placement of the INS Reinsurance Program. Instead, INS issued a letter, dated April 2, 2009, authorizing HRG (and Howden, as co-broker) to place the INS Reinsurance Program. (Copies of the April 2, 2009 letter, along with a certified English translation, are attached hereto as Exhibits D and E, respectively.) Thus, the material terms and conditions of the agreement relating to HRG's and Howden's compensation for the placement of the INS Reinsurance Program are found in the Invitation to Tender and the HRG Tender.

26. In the alternative and in the event there was no contractual relationship among the parties, HRG and Howden proceeded to provide broking services to INS in connection with the INS Reinsurance Program beginning on or around April 2, 2009 and received compensation for their services.

27. On April 23, 2009, HRG confirmed that the INS Reinsurance Program had been placed. INS began to pay the reinsurance premium as it became due in accordance with the information provided by HRG.

F. INS's Replacement of HRG and Howden as Brokers and Discovery of Overcharging

28. Following the placement of the INS Reinsurance Program, INS requested on several occasions through mid-June 2009 that HRG produce the Reinsurance Slips.

It is customary for reinsurance brokers to provide such information to the reinsured and, indeed, they are legally obligated to do so as agents for the reinsured. Also, as alleged above, the Invitation to Tender states that the broker must produce any reinsurance slips for the INS Reinsurance Program to INS. (Ex. A at ¶ 3.)

29. However, HRG did not provide the requested Reinsurance Slips and otherwise performed unsatisfactorily. Accordingly, on June 23, 2009, INS notified HRG that it had terminated the broking relationship.

30. On June 24, 2009, INS appointed Willis Limited ("Willis") as the replacement broker. That same day, INS and Willis met with Howden to request copies of the Reinsurance Slips, as well as accompanying accounting records.

31. After HRG and Howden continued to refuse to provide the Reinsurance Slips and other requested information, INS threatened legal action against the brokers to force the release of the records. Around this same time period, INS received from certain reinsurers copies of some of the Reinsurance Slips; those documents showed that the premium for the reinsurance was higher than it should have been.

32. By letter dated July 24, 2009 (the "July 24 Letter"), Mr. Blake of HRG informed counsel for INS that HRG and Howden finally would be producing the Reinsurance Slips (which INS received on July 28, 2009). (A copy of the July 24 Letter is attached hereto as Exhibit F.) In the July 24 Letter, Mr. Blake specifically noted that HRG "did, in fact, in conjunction with Howden Insurance Brokers Of London, Ltd. [sic], place the reinsurance on behalf of INS."

33. The Reinsurance Slips revealed that HRG and Howden had overcharged INS in respect of brokerage and gross premium for the INS Reinsurance Program. According to the Reinsurance Slips, HRG and Howden charged INS a total brokerage fee of \$1,437,584 (by deducting it from the gross premium paid by INS), rather than the agreed-upon \$187,530. INS, therefore, paid at least \$1,250,054 (*i.e.*, \$1,437,584 minus \$187,530) more in brokerage than it should have. Further, INS discovered from its examination of the Reinsurance Slips that the total gross premium due should have been \$12,008,293. However, INS paid to HRG gross premium totaling \$13,080,207, which is a discrepancy of \$1,071,914. Thus, HRG and Howden overcharged INS approximately \$2.3 million (\$1.2 million in brokerage and \$1.1 million in premium).¹

34. In the alternative, even if there was no contract among the parties regarding the placement of the INS Reinsurance Program, HRG and Howden overcharged INS in respect of brokerage and gross premium. The approximately \$1.4 million in total brokerage retained by HRG and Howden was excessive and unreasonable under the circumstances. Moreover, HRG and Howden had no legitimate justification for charging INS approximately \$1.2 million more in premium than is set forth in the Reinsurance Slips.

35. INS paid the premium for the INS Reinsurance Program as it became due in order to preserve the coverage, but it also put HRG and Howden on notice regarding the foregoing overpayments. HRG and Howden, however, have wrongfully refused to return the funds to INS.

¹ The foregoing figures are based on currently available information, and INS fully reserves its right to amend or supplement them.

Count I
Breach of Express Contract
(As against HRG and Howden)

36. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-2, 4-7, 14-16, 18-25, 27-33 and 35 of this Complaint as if fully set forth herein.

37. The Invitation to Tender and the HRG Tender constitute an enforceable contract among INS, HRG and Howden with regard to the placement of the INS Reinsurance Program. HRG signed and submitted the HRG Tender, thereby accepting the terms of the Invitation to Tender. HRG thereafter provided broking services to INS by placing the INS Reinsurance Program. Howden demonstrated its acceptance of the terms of the Invitation to Tender by participating in the submission of the HRG Tender and thereafter acting as co-broker for INS.

38. HRG and Howden breached the contract by, among other things: (1) charging INS brokerage fees well in excess of the agreed-upon fixed amount of \$187,530; and (2) charging INS more premium than was actually due for the INS Reinsurance Program.

39. As a result of HRG's and Howden's breach of contract, INS suffered damages in an amount to be determined at trial.

WHEREFORE, Plaintiff demands judgment against HRG and Howden for breach of an express contract and seeks damages, attorneys' fees and costs and such other relief as this Court deems just and proper.

Count II
Breach of Implied Contract
(As against HRG and Howden)

40. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-2, 4-7, 14-16, 18-25, 27-33 and 35 of this Complaint as if fully set forth herein.

41. Even if no express contract was formed among INS, HRG and Howden, a contract among the parties should be implied by law in order to prevent unjust enrichment.

42. INS conferred a benefit upon HRG and Howden in the form of premium payments in connection with the INS Reinsurance Program, from which a fixed brokerage fee was to be deducted. However, HRG and Howden overcharged INS in the manner alleged above. Under the circumstances, it would be inequitable for HRG and Howden to retain the overpayments made by INS.

43. Accordingly, HRG and Howden have breached the implied contract among the parties and, as a result, INS has suffered damages in an amount to be determined at trial.

WHEREFORE, Plaintiff demands judgment against HRG and Howden for breach of an implied contract and seeks damages, attorneys' fees and costs and such other relief as this Court deems just and proper.

Count III
Negligence (Broker Malpractice)
(As against HRG and Howden)

44. Plaintiff repeats and realleges the allegations contained in Paragraphs 1-2, 4-6, 8, 14-15, 17, 26-32 and 34-35 of this Complaint as if fully set forth herein.

45. At all relevant times, HRG was a broker for the placement of the INS Reinsurance Program. Therefore, HRG was INS's agent and owed INS a duty to act as a reinsurance broker of reasonable skill and diligence would act under the circumstances.

46. Howden owed the same duty to INS as a sub-broker for HRG.

47. HRG's and Howden's duties included, among other things, the duty to procure reinsurance for INS in accordance with INS's needs, the duty to charge only the amount of premium reflected in the Reinsurance Slips and the duty to charge a reasonable brokerage fee for their services.

48. HRG and Howden breached the duties they owed INS by failing to act as a reinsurance broker of reasonable skill and diligence would act under the circumstances in placing the INS Reinsurance Program. Those breaches of duty included, without limitation: (a) charging more premium than was reflected in the Reinsurance Slips; (b) charging more brokerage than was reasonable and/or customary; (c) refusing to provide timely information to INS concerning the reinsurance and related matters; (d) wrongfully refusing to return the overcharged amounts to INS upon request; and (e) otherwise failing to provide broking services or act in a manner consistent with the usual custom and practice in the reinsurance industry.

49. As a proximate result of such breaches, INS suffered damages in an amount to be determined at trial.

WHEREFORE, Plaintiff demands judgment against HRG and Howden for negligence and seeks damages, attorneys' fees and costs and such other relief as this

Court deems just and proper. Plaintiff also intends to seek punitive damages pursuant to Fla. Stat. § 768.72, and will proffer evidence to this Court showing Plaintiff's reasonable basis for recovery of such damages.

Count IV
Breach of Fiduciary Duty
(As against HRG and Howden)

50. Plaintiff repeats and realleges the allegations contained in paragraphs 1-2, 4-6, 8, 14-15, 17, 26-32 and 34-35 of this Complaint as if fully set forth herein.

51. At all relevant times, HRG and Howden acted as broker and sub-broker, respectively, for the placement of the INS Reinsurance Program. As such, they owed fiduciary duties to INS, including the duty to act in a manner consistent with the best interests of INS.

52. HRG's and Howden's duties included, among other things, the duty to procure reinsurance for INS in accordance with INS's needs, the duty to charge only the amount of premium reflected in the Reinsurance Slips and the duty to charge a reasonable brokerage fee for their services.

53. HRG and Howden breached the duties they owed INS by failing to act in a manner consistent with the best interests of INS in placing the INS Reinsurance Program. Those breaches of duty included, without limitation: (a) charging more premium than was reflected in the Reinsurance Slips; (b) charging more brokerage than was reasonable and/or customary; (c) refusing to provide timely information to INS concerning the reinsurance and related matters; (d) wrongfully refusing to return the overcharged amounts to INS upon request; and (e) otherwise failing to provide broking

services or act in a manner consistent with the usual custom and practice in the reinsurance industry.

54. As a proximate result of such breaches, INS suffered damages in an amount to be determined at trial.

WHEREFORE, Plaintiff demands judgment against HRG and Howden for breach of fiduciary duty and seeks damages, attorneys' fees and costs and such other relief as this Court deems just and proper. Plaintiff also intends to seek punitive damages pursuant to Fla. Stat. § 768.72, and will proffer evidence to this Court showing Plaintiff's reasonable basis for recovery of such damages.

Count V
Aiding and Abetting Breach of Fiduciary Duty
(As against Howden)

55. Plaintiff repeats and realleges the allegations contained in paragraphs 1-2, 4-6, 8, 14-15, 17, 26-32, 34-35 and 51-54 of this Complaint as if fully set forth herein.

56. As alleged above, HRG was a broker for the placement of the INS Reinsurance Program and, therefore, owed INS a fiduciary duty. HRG breached its fiduciary duty to INS in the manner alleged above in Count IV.

57. Even if Howden did not owe a similar duty to INS, it provided substantial assistance and encouragement to HRG, the primary wrongdoer, with full knowledge of HRG's breach of fiduciary duty. As alleged above, Howden fully participated in the placement of the INS Reinsurance Program. Therefore, it had full knowledge of HRG's wrongdoing and substantially assisted HRG in its wrongdoing. Among other things, Howden provided substantial assistance to HRG by locating some or all of the

reinsurers for the INS Reinsurance Program, by wrongfully refusing to provide timely information to INS concerning the reinsurance and related matters and/or by wrongfully refusing to return the overcharged amounts to INS upon request.

58. As a result of Howden's aiding and abetting of HRG's breach of fiduciary duty, INS suffered damages in an amount to be determined at trial.

WHEREFORE, Plaintiff demands judgment against Howden for aiding and abetting HRG's breach of fiduciary duty and seeks damages, attorneys' fees and costs and such other relief as this Court deems just and proper. Plaintiff also intends to seek punitive damages pursuant to Fla. Stat. § 768.72, and will proffer evidence to this Court showing Plaintiff's reasonable basis for recovery of such damages.

JURY DEMAND

Plaintiff hereby demands trial by jury on all issues so triable herein.

CERTIFICATION

We hereby certify that the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding, nor is any such action or proceeding presently contemplated.

September 23, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
U. S. Mail, first class, on this 23rd day of September, 2010 to:

<p>Barry Greenberg, Esq. Fowler White Burnett, P.A., Espirito Santo Plaza – 14th FL 1395 Brickell Avenue Miami, FL 33131-3302 <i>Attorney for Defendant Hemispheric Reinsurance Group, L.L.C.</i></p>	<p>Andrew E. Grigsby, Esq. Melissa Guillinov, Esq. Hinshaw & Culbertson LLP 9155 S. Dadeland Boulevard Suite 1600 Miami, FL 33156-2741 <i>Attorney for Defendant Howden Insurance Brokers Limited</i></p>
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By: John F. O'Sullivan / pvt

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