

**DIV. F**  
JUDGE  
PATRICK J. McCABE

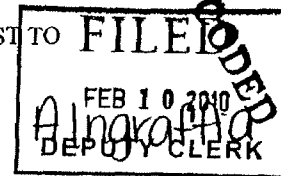
24<sup>TH</sup> JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO: 083.426.

DIVISION:

ST. HELENA CORPORATION, SUCCESSOR IN INTEREST TO  
POWELL INSURANCE AGENCY, INC.



VERSUS

UNGARINO & ECKERT, LLC, WESTPORT INSURANCE CORPORATION, SWISS  
REINSURANCE COMPANY LTD.

FILED: \_\_\_\_\_

\_\_\_\_\_  
DEPUTY CLERK

**PETITION**

The Petition of St. Helena Corporation as successor to Powell Insurance Agency, Inc. ("Powell"), a Louisiana corporation licensed to do business in Louisiana, states as follows:

**PARTIES AND VENUE**

1.

During all times relevant herein, Powell was a licensed insurance agent in Louisiana. When Hurricane Katrina struck Louisiana, it had served its clients in the New Orleans metropolitan area and southern Louisiana for over forty years.

2.

Defendant Ungarino & Eckert, LLC (hereinafter "Ungarino & Eckert") is a Louisiana limited liability company with offices located at 3850 North Causeway Boulevard, Metairie, Louisiana in Jefferson Parish.

3.

Defendant Swiss Reinsurance Company Ltd. is a Swiss corporation with main offices in Zurich, Switzerland. Defendant Westport Insurance Corporation is a Missouri corporation with main offices located in Overland Park, Kansas and Jefferson City, Missouri. Westport is a wholly-owned subsidiary of Swiss Reinsurance Company. Swiss Reinsurance Company and Westport Insurance Corporation shall be hereinafter referred to collectively as "Swiss Re."

4.

Powell is the primary insured under claims made professional insurance policies provided by Defendants Westport Insurance Corporation and Swiss Reinsurance Company Ltd.

(hereinafter collectively referred to as "Swiss-Re") for the period September 17, 2004 through September 17, 2007.

5.

The contracts for professional liability insurance between Powell and Swiss Re were issued in Jefferson Parish. Defendant Ungarino & Eckert has offices in Jefferson Parish. A significant amount of the legal services rendered by Ungarino & Eckert were performed in Jefferson Parish, and damages sustained by Powell occurred in Jefferson Parish. Therefore, venue is appropriate in Jefferson Parish.

#### **FACTUAL BASIS – THE POLICIES**

6.

During all times relevant herein, Powell was covered by professional liability insurance policies provided by Swiss Re, including Policy PAL207242, effective from September 17, 2004 to September 17, 2005, Policy WED4LA005095500, effective from September 17, 2005 to September 17, 2006, and Policy WED4LA005095501, effective from September 17, 2006 to September 17, 2007.

7.

The policies obligate Swiss Re to "pay on behalf of the insured 'loss' for which the insured is legally liable caused by a 'wrongful act' committed by an insured arising out of 'professional services' rendered to others." The policies further obligate Swiss Re to defend Powell arising from "claims" first made based upon alleged "wrongful acts" of the insured. The policies permit Swiss Re to select the attorney to represent Powell. However, the policies prohibit any claim from being settled without Powell's consent.

8.

The right to select counsel is not absolute. Moreover, in light of the contractual obligations owed to Powell by Swiss Re, and having availed itself of its right to select counsel, Swiss-Re assumed responsibility for the wrongful conduct of its selection.

9.

The policies obligate Powell to pay a deductible of \$50,000 for each "claim." The policy form defines the deductible to include "loss" but not "claim expenses." However, an

endorsement attached to each policy redefines the deductible as including both “loss” and “claim expenses” in defense of claims first made against any insured.

10.

The policies state that “[t]wo or more ‘claims’ arising out of a single ‘wrongful act,’ as defined in each of the attached ‘coverage units,’ or a series of related or continuing ‘wrongful acts,’ shall be a single ‘claim.’” The policies define a “wrongful act” as “any negligent act, error, omission, or ‘personal injury’ of an insured or any person for whose acts the insured is legally liable in rendering services for others.”

#### FACTUAL BASIS – THE CLAIMS

11.

Hurricane Katrina struck south Louisiana on August 29, 2005.

12.

Prior to Hurricane Katrina, Powell regularly sent a written letter to customers who did not have flood insurance. The letter advised those customers that they did not have flood insurance, and that their hurricane policy would not cover flood insurance. The letter recommended to the customers that they should consider obtaining flood insurance in order to recover if any flood damage were to be inflicted on their house. In a letter to Powell dated January 24, 2007, Attorney Matthew J. Ungarino of Ungarino & Eckert described Powell’s notice letter as a “model that we have recommended to our insurance agent clients.” In addition, Mr. Ungarino noted that Powell was “the only agent we represent that had mentioned ‘excess flood’ [insurance] being available to their clients.”

13.

Despite Powell’s efforts, the company was nonetheless joined as a defendant in numerous lawsuits filed on behalf of his customers after Hurricane Katrina. The first of these lawsuits was filed on August 24, 2006. Most of these lawsuits were primarily filed against the customers’ insurance company, but Powell was joined as a defendant in the suits.

14.

Many of the suits against Powell asserted that Powell had failed to properly advise the client regarding the availability of insurance coverage that would have covered them for the

damages they sustained as a result of Hurricane Katrina and/or failed to procure the appropriate insurance for the client. Many of the suits also involved related insureds/clients.

15.

In response to the initial lawsuits, Powell retained Jack Alltmont, an experienced attorney who had previously represented Powell in similar insurance agent disputes.

16.

Powell also notified Swiss Re of the suits. Instead of maintaining Alltmont's continuing representation of Powell, Swiss Re retained Ungarino & Eckert to represent Powell. Powell objected to this action, but Swiss Re persisted in its decision to retain Ungarino & Eckert. Powell fully cooperated with Ungarino & Eckert immediately and throughout its representation of Powell.

17.

Swiss Re's objection to allowing Alltmont to represent Powell was arbitrary and capricious given Alltmont's qualifications and the fact that Alltmont was retained by Swiss Re to represent other brokers insured by Swiss Re.

18.

Swiss Re's insistence on hiring Ungarino & Eckert was also wrongful because Swiss Re did not unconditionally accept coverage for the claims, but instead issued a reservation of rights in which it reserved the right to deny coverage.

19.

Ungarino & Eckert's representation of Powell lasted from October 30, 2006 to December 2007. During this period, Ungarino & Eckert unnecessarily billed large amounts of time on a total of thirty nine cases that involved similar or nearly identical factual and legal issues.

20.

In addition, Ungarino & Eckert ignored the wishes and instructions of its client, Powell. For example, against Powell's wishes, Ungarino & Eckert sought to remove numerous cases to federal court. Ungarino & Eckert did this despite the fact that the Eastern District of Louisiana repeatedly remanded such cases back to state court as improvidently removed. Ungarino & Eckert attempted to remove cases despite the fact that, in some instances, there was no consent from co-defendants to remove or jurisdiction was lacking.

21.

Ungarino & Eckert has been sanctioned for its conduct in removing cases to federal court. See, e.g., *Zeb Hollier, v. Willstaff Worldwide, Inc.* U.S.D.C. Western District of Louisiana, Civil Action no. 08-1382 (citing *Fontentot v. Granite State Insurance Company*, 2008 WL 4822283 (W.D.La.11/3/08) (awarding \$2,500 in attorneys' fees to plaintiff due to improper removal and firm's history); *Saxton v. Thomas*, 2007 WL 1115239 (W.D.La. 4/12/07) (noting that "[a]lmost every notice of removal filed by the firm in recent years has been defective for one reason or the other, with the most common problems being failure to meet the minimal requirements of pleading the parties' citizenship and failure to plead or point to facts adequate to satisfy the amount in controversy requirement," and awarding plaintiffs \$1,000 in legal fees for the improper removal) (citing *McClelland v. A.I.G. Ins. Co. Inc.*, 02-CV-822; *Century Surety Co. v. Hays Brothers Angus Ranch*, 04-CV-0010; *West v. State Farm*, 03-CV-1118; *Jackson v. Braden*, 04-CV-0313; *Pinkney v. Family Dollar*, 04-CV-1175; *Folks v. Goforth*, 05-CV-0215; *Woods v. Eckerd*, 05-CV-704; *Shyne v. Ryan's Family Restaurant*, 05-CV-1190; *Evans v. Family Dollar*, 05-CV-1517; and *Atkinson v. Laich Industries Corp.*, 05-CV-966); *Saxon*, 2007 WL 1974914 at \*5 (affirming a \$1,000.00 award of attorneys' fees and costs to be paid by Ungarino & Eckert to defer the "firm from continuing to file poorly prepared, defective notices of removal."); *George v. Dolgencorp, Inc.*, 2007 WL 4678577 at \*2 (recommending sanctions because defendant's attorneys [Ungarino and Eckert] continue to attempt to remove cases to this court relying on their boiler plate notice of removal form and no support for federal jurisdiction ..."); *George*, 2008 WL 103957 at \*2 (declining to impose sanctions against the defendant's counsel, noting "the decision is a close one" and that "the Court's patience with mere conclusory allegations of jurisdiction from form removal documents, unsupported by any evidence outside the petition, is quickly running out"); *Hampton v. Fred's Stores of Louisiana*, 06-CV-721 (warning that "it is time for such poorly prepared notices of removals to stop" and that "future problems of this nature will be addressed in open court rather than through orders that spell out how to fix the mistakes counsel has made in a notice of removal" and that "the court will consider sanctions or other deterrents ..."); *Dailey v. Dollar General Stores*, 05-CV-1472 (remanding for lack of sufficient jurisdictional amount); *Miller v. Bolton*, 01-CV-799 (same); *Hebert v. Nationwide Mutual Insurance Co.*, 01-CV-367 (same); *Burgess v. Ryans Family*

*Steakhouse, Inc.*, 07-CV-385 (same); *Edwards v. Fred's Inc.*, 05-06 CV-288 (same); *Keyser Avenue Properties, LLC v. Fred's Stores of Tennessee, Inc.*, 06-CV-2199 (same); *Gatlin v. Dolengencorp., Inc.*, 05-CV-2114 (same); *Murray v. Oliver*, 05-CV-1964 (same); *Guin v. Family Dollar Stores, Inc.*, 00-CV- 657 (same); *Demette v. Telecable Associates*, 02-CV-737 (recommending remand for lack of sufficient jurisdictional amount, but case settled prior to remand). See also *Johnese v. Guideone Mutual Insurance Co.*, 05-CV-1039-D-M3 (M.D.La.) (remanding for lack of sufficient jurisdictional amount); *Nodier v. Ungarino and Eckert, LLC*, 04-895-D-M3 (M.D.La.) (noting that “this is the second instance of this defendant removing a case of this type to this court without any legal basis for doing so” and accordingly awarding \$5,101.25 in attorneys’ fees and \$199.00 in costs for improvident removal, but denying Rule 11 sanctions warning that “any similar action in the future will trigger a cause for sanctions.”)). The Court’s Memorandum in *Hollier* is attached as Ex. A.

22.

In addition, the overall strategy pursued by Ungarino & Eckert was ill advised and contrary to the express wishes and directions of its client, Powell.

23.

As noted above, the Swiss Re policies contained deductible provisions. Those provisions call for the payment of a single deductible where there are “[t]wo or more ‘claims’ arising out of a single ‘wrongful act,’ as defined in each of the attached ‘coverage units,’ or a series of related or continuing ‘wrongful acts.’” Swiss Re made no attempt to determine whether the various suits against Powell constituted “[t]wo or more ‘claims’ arising out of a single ‘wrongful act,’ as defined in each of the attached ‘coverage units,’ or a series of related or continuing ‘wrongful acts.’” Instead, Swiss Re instructed Ungarino & Eckert to bill Powell for all legal fees and expenses up to \$50,000 per suit without regard to whether the suits arose out of a single wrongful act, or a series of related or continuing wrongful acts.

24.

Powell became concerned early with the overbilling and unnecessary tactics by Ungarino & Eckert. Powell repeatedly voiced these concerns to Swiss Re.

25.

For example, in a letter dated April 26, 2007, Powell informed Ungarino & Eckert that it believed its bills to be too high. In fact, Powell had already been charged over \$130,000 in legal fees in the just the first six months Ungarino & Eckert represented Powell. The letter further informed Ungarino & Eckert that Powell had hired a litigation manager in order to manage and minimize those escalating fees. Powell specifically informed Ungarino & Eckert that its strategy of removing cases to federal court was having unsatisfactory results and was highly costly. Powell further identified other concerns it had with Ungarino & Eckert's handling of the cases. The letter requested that Powell, as the client, be consulted regarding further litigation strategy decisions.

26.

Powell also informed Ungarino & Eckert in the April 2007 letter that it did not need Attorney Suit Reports ("ASR"). ASRs are reports that Swiss Re required from attorneys representing insureds. These reports were required by Swiss Re every 90 days. While these reports were sent to Swiss Re, Powell was charged for the preparation of the ASRs. These ASRs were of little to no value to Powell in its pursuit of litigation. Accordingly, Powell requested that they be ceased, or alternatively that Powell no longer be charged for their preparation.

27.

Despite being notified that it was overbilling, Ungarino & Eckert disregarded Powell's wishes. On occasion, Ungarino & Eckert would even bill the same legal service to multiple files, resulting in duplicative billing. The law firm billed in excess of \$300,000 in legal fees.

28.

After repeated complaints from Powell, Swiss Re eventually allowed Powell to retain Jack Alltmont to take over the cases again. In all, Alltmont charged less than half the total charges by Ungarino & Eckert. This contrast is made even starker considering that Alltmont's billable rate (\$295/hour) was nearly *twice* that of Ungarino & Eckert's most expensive attorney (\$160/hour).

29.

In addition, Swiss Re wrongfully refused to compensate Powell for the costs incurred in hiring a litigation manager to oversee the claims, notwithstanding that this is a reasonable cost

covered under the Policy. Swiss Re's refusal to pay this cost, totaling \$84,272, was arbitrary and capricious.

**CAUSES OF ACTION**

**BREACH OF CONTRACT AGAINST SWISS RE**

30.

Plaintiff realleges Paragraphs 1 to 29 as if set forth fully herein.

31.

Swiss Re was obligated by the insurance policies to provide competent counsel that would represent Powell and regard Powell as its client.

32.

Swiss Re breached its obligation to Powell to provide such counsel in hiring Ungarino & Eckert, which pursued unmeritorious tactics and overbilled each case.

33.

Swiss Re also breached its contract to Powell to provide counsel to Powell that would serve Powell's interests alone. By interfering in the attorney-client relationship, Swiss Re breached its contractual duties.

34.

Swiss Re further breached its contract with Powell by applying a new \$50,000 deductible to each suit filed, when in fact the terms of the insurance policy dictate that those cases arising out of that "[t]wo or more 'claims' arising out of a single 'wrongful act,' as defined in each of the attached 'coverage units,' or a series of related or continuing 'wrongful acts,' are subject to a single deductible. As a result, Powell was wrongfully required to pay multiple deductibles.

35.

Swiss Re further breached its contract by refusing to reimburse Powell for the cost of hiring a litigation manager.

36.

As a result of Swiss Re's breach of contract, Powell suffered damages, to include the overbilling by Ungarino & Eckert, the cost of hiring a litigation manager solely for the purpose of overseeing Ungarino & Eckert's billing, and the cost of hiring Jack Alltmont as new counsel. Powell further alleges that Swiss Re's breach of contract was in bad faith.



**BREACH OF CONTRACT AGAINST UNGARINO & ECKERT**

37.

Plaintiff realleges Paragraphs 1 to 29 as if set forth fully herein.

38.

Ungarino & Eckert, in providing contracted legal services to Powell, overbilled Powell for legal services. Ungarino & Eckert refused to follow the instructions set forth by Powell, did not regard Powell as its client, and charged Powell for unnecessary legal work.

39.

As a result of Ungarino & Eckert's conduct, Powell suffered damages, to include the excess legal fees, the cost of hiring a litigation manager solely for the purpose of overseeing Ungarino & Eckert's billing, and the cost of hiring Jack Alltmont as new counsel. Powell further alleges that Ungarino & Eckert's breach of contract was in bad faith.

40.

Swiss Re is jointly and severally liable for Ungarino & Eckert's conduct. Swiss Re has the duty to defend Powell under the Policies. It insisted on the appointment of Ungarino & Eckert to fulfill that duty, and is liable for the actions of its selection. Further, although it has the general right to select counsel, that right is not absolute, and Swiss Re lost that right by issuing a reservation of rights and/or abused that right by insisting that Ungarino & Eckert be appointed and ignoring Powell's wishes and complaints.

**BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING AGAINST SWISS RE**

41.

Plaintiff realleges Paragraphs 1 to 29 as if set forth fully herein.

42.

Swiss Re was obligated to fulfill its contractual duties in good faith and with fair dealing.

43.

The acts of Swiss Re as set forth herein violated its duties of good faith and fair dealing.

44.

Due to the above-described breaches of Swiss Re's duties to Powell, Swiss Re is liable for damages, penalties and attorneys fees under the Louisiana Insurance Code, and in particular La. Rev. Stat. § 22:1973 (formerly 22:1220).

**JURY DEMAND**

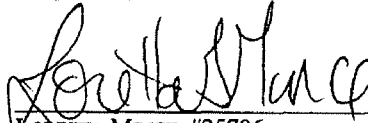
Powell requests a trial by jury for all issues that are so triable.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray that after all due proceedings had, they be awarded the following:

- (1) All of the damages resulting from the conduct and transactions outlined above, including but not limited to reimbursement of legal fees previously paid to Ungarino & Eckert, reimbursement of fees paid to Jack Alltmont and reimbursement of the cost of hiring a litigation manager.
- (2) Penalties for bad faith conduct pursuant to the Louisiana Insurance Code;
- (3) Attorneys' fees, costs and other expenses;
- (4) Both pre-judgment and post-judgment interest;
- (5) All costs; and
- (6) All other sums they are entitled to at law or equity.

Respectfully submitted,



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**PLEASE HOLD SERVICE**