

# INSURANCE LITIGATION™

*Reporter*

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## Phoney "Parmenidean" Practices: Aon's Place in the Insurance Litigation Exposé

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This is the fifth essay in a series involving the recent scandal surrounding one of the most lucrative industries in the world, insurance brokerage.<sup>1</sup> The central figures in the scandal have been Eliot Spitzer, the Attorney General of the State of New York, and Marsh & McLennan Companies, Inc. (herein, "MarshMac"), the largest insurance intermediary in the world.<sup>2</sup> However, the scandal has grown beyond Spitzer and MarshMac. Other state regulators have joined the fray, and more insurance brokerages have become targets of investigation. This essay is about the second largest brokerage in the world, Aon,<sup>3</sup>

which recently settled suits with multiple state agencies over its compensation practices. Later essays will concern the investigations involving other insurance brokerages, such as Willis, other brokers and AIG.

In previous articles, we discussed some of the history behind the investigations into the insurance brokerage industry's practices in placing insurance and how the broker and/or intermediaries are (and are supposed to be) compensated. We don't repeat the explanation here. We begin with a short corporate history of Aon. We then discuss the more recent

1. See Michael Sean Quinn, *Before the Marsh & McLennan Scandal and its Times*, 27 INSURANCE LITIGATION REPORTER 5 (2005); Michael Sean Quinn & Melissa Hamilton, *Marsh & McLennan: Some Brief History Before the Spitzer Scandal-Part A: The Insurance Side of the Business*, 27 INSURANCE LITIGATION REPORTER 125 (2005); Melissa Hamilton & Michael Sean Quinn, *Marsh & McLennan: Some More Brief History Before the Spitzer Scandal-Part B: Putnam, Trident & Mercer*, 27 INSURANCE LITIGATION REPORTER 197 (2005); Michael Sean Quinn & Melissa Hamilton, *Spitzer v. MarshMac*, 27 INSURANCE LITIGATION REPORTER 277 (2005). (Essay IV).

2. MarshMac's first quarter savings in 2005 declined by 70%. Premiums have declined. New business has declined. The U.S. unit of the brokerage firm is the heart of company revenues—about 20% of the total. Its savings are way down. Ian McDonald, *Marsh Posts 70% Drop in Earnings*, WALL STREET JOURNAL, May 4, 2005, at C3 (May 4, 2005). So have those of Putnam, one of MarshMac's subs, but not those of another two: Mercer and (what is now called) MarshKroll.

3. Aon is a Gaelic word meaning "oneness." *Blumenthal v. Aon Corporation*, filed in the Judicial District of Hartford, State of Connecticut Superior Court, April 5, 2005, at 5. Hence, the title of the essay. See, Anthony Kenny, *ANCIENT PHILOSOPHY*, 17-19, 199-204 (2004). According to Parmenides, in one of the few of his poetic essays "we have left," and in accordance with reports about him coming from both Plato and Aristotle, Parmenides had a systematic metaphysics. "Whatever there is, whatever can be thought of, is for Parmenides nothing more than Being. Being is *one and indivisible*.... When a kettle of water boils away, this may be in Heraclitus' words, the death of water and the birth of air; but for Parmenides, it is not the death or birth of being. Whatever changes may take place, they are not changes from being to non-being; they are all changes within Being, but for Parmenides, there is not, in fact, any real changes at all. Being is everlastingly the same[.]" *Id.* at 18. (Italics added.) Thus, there is a certain similarity between Aon's conception of itself and Parmenidean metaphysics. Interestingly, Parmenides thought that time was in some sense unreal. This may explain some of the problems of Aon. If time is unreal, since the future does not exist, one cannot get caught in it. Parmenides even wrote the following: "What is for saying and for thinking must be—it is for Being [to] be[,] but nothing is not [anything.]" *Id.* at 200. We confess that we have not actually seen any such language in any of Aon's literature. Then again, its inspiration is Gaelic, not Greek. Then again, although Parmenides was an ancient Greek philosopher, he lived in Italy.

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events regarding the investigation of Aon, the lawsuit filed by several state agencies, and the immediate settlement of the lawsuit by Aon. We will outline the allegations in the complaints and lay out the important parts of the settlement. The latter includes a heavy financial burden and, perhaps more importantly, requires Aon to drastically change some of its business practices.

Finally, there will be a general conclusion, which will also be somewhat speculative. In that conclusion, we will consider the implications of sociology of business and business ethics, plus extra witnesses, for the future litigation of problems flowing from the scandal which began with MarshMac. This is not the kind of thing which is often written about in litigation literature, but it is something that needs to be faced.

### A Short Aon Chronology

Aon is a Fortune 200 Company, with revenues exceeding \$10 billion in 2004. It is a substantial company, and its reach in both insurance and geography is vast. Aon has three operating divisions. The first, which is of interest to us in this article, is its Risk and Insurance Brokerage Services unit. The first is the largest of the three units, accounting for over half of its revenues. The second unit is Human Capital Consulting, and the third is Specialty Insurance Underwriting.

There are two main branches to be traced in understanding the origins of today's Aon. The first is linked to W. Clement Stone, who in 1922 founded an insurance agency called Combined Registry Co.<sup>4</sup> Stone built his intermediary up to 1,000 agents by

1930, where upon the Great Depression greatly reduced the ranks.<sup>5</sup> Starting in 1939, as if anew, Stone created various new insurance agencies, merged some agencies, and he made some acquisitions. By 1969, Stone's companies had annual written premiums of over \$180 million, with assets of \$225 million. Agents sold accident and health insurance directly to consumers and businesses. Through some financial ups and downs over the next decade, Combined continued to grow. In August 1982, Combined acquired Ryan Insurance Co. for \$144 million.

This leads us to the second branch of the history and the man behind Ryan Insurance Company: Patrick G. Ryan ("Ryan"). Despite building Aon into a corporate giant with \$10 billion in revenues, he had less than modest beginnings. One reporter refers to Ryan's upward mobility as a "Horatio Alger story."<sup>6</sup> Ryan was born in 1937. He grew up in a Milwaukee suburb where his father was a car dealer. After graduating from Northwestern in 1959, Ryan became a life insurance agent.<sup>7</sup> At first, he worked with Penn Mutual, but then acceded to his mother's request that he help his father at the car dealership.<sup>8</sup> Not particularly interested in selling cars, Ryan found a potential market for selling insurance to car buyers.<sup>9</sup> He pursued this new commercial idea, and thereby successfully used his social ties to raise funds and convinced car dealers that he could sell credit insurance to car buyers in their shops.<sup>10</sup> He is credited as the founder of the idea that car dealerships hire trained insurance agents to pitch insurance products related to the car purchase.<sup>11</sup> Credit insurance already existed, but was generally handled

4. Aon Corp. History, *Business & Company Resource Center*, Gale Group. (No Date Given.)

5. For a systematic account of the history of the depression, see, David M. Kennedy's lengthy study, *FREEDOM FROM FEAR* (1999), one volume in *The Oxford History of the United States*. For essays on depression economics, including employment, see, Ben S. Bewake, Ed., *ESSAYS ON THE GREAT DEPRESSION* (2000). For an account of the impact of the famous stock market collapse, see Maury Klein, *RAINBOW'S END. THE CRASH OF 1929* (2001).

6. Dyan Machan, *Devouring Risk*, *FORBES*, Aug. 23, 1999, at 106. Horatio Alger (1832-1898) was an American author who wrote a number of novels with the same basic concept of the American Dream. In each work generally introducing a new hero was a portrayal of a young, lower class boy who overcame societal obstacles to achieve great success in America's capitalistic economy. Indeed, Ryan was awarded the Distinguished Americans Award by the Horatio Alger Association. *This Summer, Risk Management Magazine Spoke with Patrick Ryan, the Chairman and CEO of Chicago-Based Insurance Broker Aon, About Whether Corporate America Needs New Leadership, His Response to September 11, the Key to Organizational Unity and Strength, the Role of Risk Management Today and its Challenging Future Head*, 49 *RISK MANAGEMENT* 26 (2002).

7. Donna Harris, *Leader's Legacy: When Pat Ryan Initiated the F&I Department, he Introduced Dealers to a Huge Profit Center*, *AUTOMOTIVE NEWS*, Feb. 28, 2005, at 25.

8. Dyan Machan, *Devouring Risk*, *FORBES*, Aug. 23, 1999, at 106

9. *Id.*

by untrained car salesmen as merely an after-thought, if it was offered at all. At least partly as a result of Ryan, dealerships found that sales of cars were more likely if customers could obtain financing and purchase credit insurance at the dealership.<sup>12</sup>

Ryan was very successful. His style is said to have been a good listener who also clearly and consistently promoted his business by stressing the benefits of purchasing insurance products.<sup>13</sup> By 1978, Ryan acquired four regional brokers, thereby making Ryan Insurance the nineteenth-largest U.S. broker.

We now reach 1982, when Ryan Insurance is purchased by Combined. Almost immediately after the acquisition, despite being the CEO of the acquiree, Ryan took over as CEO from Combined's, by then, elderly founder, N. Clement Stone. Ryan moved quickly to build what is today the second largest insurance brokerage in the world.

A few notes on Ryan's personality are appropriate to explain how Ryan, who started out with a single

person agency, was able to cobble together a \$10 billion, global brokerage. He is described as "6 feet 2 inches tall, white-haired and patrician in appearance, exert[ing] bipartisan political influence."<sup>14</sup> He was, and still is, not only a highly photogenic and handsome "devil," he was, and is, enormously energetic, though he is now well over 68 years old. Ryan is said to conduct his business using "an old Chicago style of corporate and political governance."<sup>15</sup> Ryan is said to be "not bound by conventional thinking" and known for his independent thinking.<sup>16</sup> Ryan co-owns the Chicago Bears football team, and his name marks Northwestern University's football field. He is friends with Chicago's current Mayor Daley and has been a dinner host to President George W. Bush. Ryan is also known as a philanthropist who donates large sums to various causes.<sup>17</sup> At the same time, at least one reporter describes Ryan as being "cost-conscious," whereby during the reporter's visit, Ryan refused to purchase

10. Credit insurance generally refers to a policy purchased in conjunction with a credit obligation that provides some type of benefit upon the occurrence of a covered event, such as the payor becomes disabled, dies, or becomes unemployed. See generally Gary Fagg & Joseph Fairchild, CREDIT-RELATED PROPERTY & CASUALTY INSURANCE (CreditRe Corporation 1998); Gary Fagg, AN INTRODUCTION TO CREDIT-RELATED INSURANCE (CreditRe Corporation 1998).

11. Donna Harris, *Leader's Legacy: When Pat Ryan Initiated the F&I Department, he Introduced Dealers to a Huge Profit Center*, AUTOMOTIVE NEWS, Feb. 28, 2005, at 25; Mac Gordon, *Break Records, Not Laws, WARD'S DEALER BUSINESS*, July 1, 2004, at 16. These are now known in the automobile sales industry as F&I units for Finance and Insurance offices.

12. F&I units in car dealerships remain quite profitable today. The average gross revenue per vehicle generated by F&I units is \$800. Mac Gordon, *Break Records, Not Laws, WARD'S DEALER BUSINESS*, July 1, 2004, at 16.

13. Even recently Ryan himself promoted his personal style in being personally connected to clients. *This Summer, Risk Management Magazine Spoke with Patrick Ryan, the Chairman and CEO of Chicago-Based Insurance Broker Aon, About Whether Corporate America Needs New Leadership, His Response to September 11, the Key to Organizational Unity and Strength, the Role of Risk Management Today and its Challenging Future Head*, 49 RISK MANAGEMENT 26 (2002).

14. Donna Harris, *Leader's Legacy: When Pat Ryan Initiated the F&I Department, he Introduced Dealers to a Huge Profit Center*, AUTOMOTIVE NEWS, Feb. 28, 2005, at 25.

15. *Chicago's Aon Seeks to Emerge from Cloud of Insurance Investigations*, CHICAGO TRIBUNE, Dec. 5, 2004. In our day and age, to refer to governance in Chicago is to refer to the Daley Family. Richard Daley was Mayor of Chicago for many years, and head of a large machine there. The machine has cleaned-up a little bit, or so it is said. His son Richard Michael is now Mayor and also the head of some sort of political machine. See, Roger Biles, *Richard J. Daley: Politics, Race & The Governing of Chicago* (2003). See, also James T. Patterson, GRAND EXPECTATIONS: UNITED STATES, 1945-1974 (1996). This is one of the volumes in the OXFORD HISTORY OF THE UNITED STATES. Professor Patterson of Brown University discusses Daddy Daley and his administration briefly. Daley became a national figure—whether villainous or otherwise—on October 28, 1968, when the Nominating Convention of the Democratic Party was held in Chicago, there were riots in the street. A number of people were injured. Daley made himself famous on national television: Abraham Ribicoff, Senator from Connecticut, was giving a televised speech. He was nominating George McGovern of South Dakota, and the following events took place: Ribocoff stared down at Daley, 20 feet away in the audience, and exclaimed, "With George McGovern we wouldn't have Gestapo tactics in the streets of Chicago." Infuriated delegates from Illinois jumped up shouting and waving their fists. Daley was "purple with rage" and shouted back with words that, while drowned out in the bedlam, were lip-read by many in the national television audience: "Fuck you, you Jew son-of-a-bitch [Y]ou lousy motherfucker, go home." Id. at 696. If Ryan actually uses this style of corporate governance, what happens to Ryan is thoroughly unpredictable under the circumstances. In today's corporate world, one does not wish to have that kind of reputation, even if one is a CEO. Indeed, particularly, if he is a CEO. We will discuss this area later in the Conclusion of this essay.

16. Id.

17. Ameet Sachdev, *Aon Selects Low-Profile Outsider as New CEO*, CHICAGO TRIBUNE, April 5, 2005.

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bottled water from his company's cafeteria because it was overpriced.<sup>18</sup> Ryan supports Aon's regularly hiring his own family members and family members of his friends: "There's a downside not to have nepotism. ... We've had nepotism forever. It's a very successful recruiting philosophy."<sup>19</sup>

As with most, if not all, insurance brokerage giants, Aon has grown over the years principally as a result of industry consolidation. During the 1980s and 1990s, insurance brokerages participated in a frenzy of merger and acquisitions. The competition over potential targets was heated, and seemingly in some cases, without full attention to financial implications. Aon embraced the challenge and threw itself into the fray. Ryan has stated that globalization was the energy behind consolidation, and that scale was what brokers needed, to compete in the global marketplace.<sup>20</sup>

Two months after Ryan became CEO of the Combined/Ryan Insurance entity, he closed the deal on acquiring the insurance brokerage Rollins Burdick Hunter ("R-B-H"). The R-B-H client base consisted of large corporate clients. Thus, Ryan then merged it into Combined intermediary; he thereby created the eighth-largest insurance broker in the U.S. Revenues started to grow by double-digit percentages while Ryan cut costs to improve operating earnings. Other acquisitions followed as the company bolstered its brokerage business for retail clients. The original focus on door-to-door sales business to consumers from Combined's earlier days was quickly overwhelmed by the new strategy of brokering on behalf of large corporate and governmental entities.

The acquisition model continued with the purchase of five regional brokerages in 1987. That same year, the brokerage side of the company took on the name "Aon", purportedly in order to distinguish the brokerage unit from its insurance subsidiary, Combined Insurance Co. of America. (The news obviously in paradoxical unity and contrast, after

all, combined entities can become one, but their *oneness* can preserve *differentness* and/or multiplicity. This often happens, of course, in business merges, purchases, absorptions, etc.)

Aon bought Bayly Martin & Faye, another large insurance broker, in 1989. This event was followed by another purchase in 1991 of a large insurance intermediary in the Netherlands which represented a wide client base in Europe.

In 1990, Ryan was named Chairman of the Aon Board. The next year, Aon was listed as a public company, on the New York Stock Exchange, according to Aon. (Combined was already publicly traded.)

According to public sources in 2005, Aon Corporation is currently a holding company that comprises a family of insurance brokerage, consulting and underwriting subsidiaries, as we have already stated. Public sources also state that its common stock is listed on the New York, Chicago, Frankfurt, and London exchanges.<sup>21</sup>

The next large acquisition occurred in 1992 when Aon acquired F.B. Hall. F.B. Hall had previously been "one of the world's finest brokerages," at least according to John Bogardus, Alexander & Alexander's former CEO, president, and Board member, in his account of the risk market in the U.S.<sup>22</sup> In the 1980s, F.B. Hall suffered a series of litigation losses related to such things as a devastating fire at a Las Vegas hotel on which F.B. Hall had placed a backdated policy, a breach of fiduciary duty suit when an F.B. Hall subsidiary acted as a managing general agent for another insurance company, and a suit by New York insurance regulators after an F.B. Hall underwriting subsidiary was declared insolvent.<sup>23</sup> These cost F.B. Hall millions of dollars, and helped make the company a suitable target for Aon's acquisition spree.

Bain Hogg Group, the largest U.K. retail brokerage, became part of the Aon family in 1996.<sup>24</sup> That same year, the sale of three business units

18. Dyan Machan, *Devouring Risk*, FORBES, Aug. 23, 1999, at 106.

19. *Chicago's Aon Seeks to Emerge from Cloud of Insurance Investigations*, CHICAGO TRIBUNE, Dec. 5, 2004. This is a complex matter, of course. Nevertheless, it is not a disreputable view. See, Adam Bellow, *IN PRAISE OF NEPOTISM: A NATURAL HISTORY* (2003). John Quincy Adams, plus others in the family, can easily be a favorite positive edge. Others include the Roosevelt family, the Kennedy family, and the Bush family, although few like them all. A few even the favor the Daley family on nepotistic grounds.

20. Catherine R. Duffy, *HELD CAPTIVE: A HISTORY OF INT'L INSURANCE IN BERMUDA* 414 (2004).

21. [www.aon.com](http://www.aon.com) (May 10, 2005).

22. John A. Bogardus Jr., *SPREADING THE RISKS: INSURING THE AMERICAN EXPERIENCE* 295 (Posterity Press 2003).

23. *Id.* at 294-95.

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indicated Aon's intent on expanding its retail business, while minimizing its consumer and direct sales strategies. Of all things, Ryan sold the business that originally placed him on the map in the insurance world. Aon sold its unit selling finance and insurance products in car dealerships for an undisclosed sum.<sup>25</sup> Also back in 1986, Aon sold two life insurance units to General Electric,<sup>26</sup> with Ryan dedicating the very successful, and possibly remarkable, \$1.23 billion purchase price, toward assembling Aon as an insurance brokerage titan.<sup>27</sup> It worked, if only for an instant. Aon purchased the then-struggling Alexander & Alexander in 1996 in a surprising tender offer.<sup>28</sup> The combination catapulted Aon to the top as the world's largest insurance broker,<sup>29</sup> at least until MarshMac eclipsed this "victory" shortly thereafter when it announced it was purchasing Johnson & Higgins, MarshMac's main competitive rival for decades.<sup>30</sup> Aon then bought the British brokerage Minet to spite MarshMac, who had been negotiating to purchase Minet from its insurance company owner.<sup>31</sup> Again, the Minet acquisition pushed Aon into first place as the world's largest reinsurance broker.<sup>32</sup> The consolidation in the insurance brokerage business escalated another notch when MarshMac acquired Sedgwick in 1998,<sup>33</sup> thereby surpassing Aon yet again.

By 2004, Aon had built an empire far beyond standard insurance intermediary services. One commentator recently offered a colorful description of the behavior of Aon and other brokerage companies in acquisition mode, with the 1990s being the "years of adding new businesses the way a schoolgirl might add new furniture to her Barbie

Dreamhouse."<sup>34</sup> As indicated earlier, it had multiple human resource and management consulting practices within its consulting unit. It also offered, as an underwriter and carrier, specialty insurance in supplemental accident, health and life, warranty and credit, and select property & casualty. It also had a big investment in a reinsurance entity located in Bermuda. Clearly, Aon had extended itself through many different links in the insurance business chain, beginning when a purchaser decides to purchase insurance. Aon offered consulting services to help commercial entities determine what coverage it needed; it referred clients to insurers Aon identified; it suggested the use of a wholesale brokerage; it helped negotiate and finalize the contracts for insurance, it even had units that actually underwrote the insurance; and then it steered insurers with whom it placed policies to reinsurers—even to its own related reinsurance company. The potential conflicts were, and still are, inherently imbedded within the entire structure. One commentator put it this way: An insurance consultant provides further vision in suggesting the fight was on with brokerage houses sparring to be "the biggest retail broker [, who] has the biggest wholesale broker [,] who also has the biggest reinsurance broker."<sup>35</sup>

In spite of the investment bull market of the 1990s, Ryan averred that Aon continued to have strong internal leadership that would prevent ethical lapses. He indicated that effective leaders (like himself) would be "cautious about dealing with the public need for effective communication, and making sure that throughout the company everybody is

24. *Id.* at 321.

25. Donna Lawrence Harris, *F&I Guru Sheds the Business that Made Him*, AUTOMOTIVE NEWS, May 13, 1996, at 4.

26. G.E., of course, as a result of one of its subsidiaries, has become involved in the recent insurance scandal, although it is not at the center of it, at least not yet. The literature on this matter is not yet developed. See, Pan Dawkins, *G.E. Decides to Restate Earnings*, CONNECTICUT POST (May 7, 2005). See also, Margery Beck, *Berkshire By G.E. Insurance Provide*, BUSINESS WEEK (May 6, 2005).

27. Bogardus, *supra* note 22, at 322.

28. *Id.* at 326.

29. Duffy, *supra* note 20, at 363.

30. *Id.* At 362; Bogardus, *supra* note \_\_\_ at 328.

31. *Id.* at 328.

32. *Id.* at 329.

33. *Id.* at 329-330; Duffy, *supra* note 22, at 394.

34. *Perspectives: Brokers' Survival May Hinge on Finding What They Do Best*, BEST'S INSURANCE NEWS, Feb. 28, 2005.

35. R.J. Lehmann, *Rewriting the Rules: Insurers and Brokers are Forced to Adopt New Policies About Commissions, Disclosures and Even the Size of their Organizations. Now They Have to Make the New Model Work*, 105 BEST'S REV., at 16 (2005).

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adhering to the same high standards."<sup>36</sup>

The independence of Aon's board of directors has been questioned Corporate Library, a business governance rating firm, gives it a "D."<sup>37</sup> Which, as most people and all parents know, is a low, though passing (sort of) grade. We will discuss some board of director problems in the conclusion later.

As of January 1, 2005, it might be fair to say that Ryan was at the apex of his career. Not only was he, on that New Year's Day, the "King" of Aon, he was many other things as well. He had been a director of the Tribune Company since 1997. The Tribune Company is a holding company for various kinds of media, including CHICAGO TRIBUNE, among others. He has served as Chairman of the Board of Trustees of Northwestern University and he has been trustee of well known hospitals and famous museums. He has received Illinois highest award, the Order of Lincoln Medallion. He has received other awards, as well. The Chicago Historical Society's Marshall Field History Award for Distinction in Corporate Leadership and Innovation, Crain Chicago Business' 1997 Executive of the Year Award, and in the same year, the College of Insurance's Leader of the Year Award. Some of the other awards he received were closely associated with the N.F.L.<sup>38</sup> Curiously, Ryan is also listed as a member of the Harvard Business School Club of Chicago. There is no indication, however, that he has taken any degrees from Chicago or attended their MBA program. Maybe he went there for a "Quickie" Seminar. It is also interesting that the Crain Chicago Business media organization is owned by the same company that publishes Business Insurance, Crain Casualties, Inc.

### The MarshMac Investigation Leads Investigators to Aon

In 2004, Spitzer was investigating the broader insurance brokerage industry around compensation practices.<sup>39</sup> The Office of the Attorney General of the State of New York began to issue subpoenas to various insurance brokerage companies operating in New York. On April 21, 2004, Spitzer's office subpoenaed Aon's records relating to agreements to pay compensation other than the standard commission practice.<sup>40</sup> The "standard" here means a known flat-fee or a flat percentage of the premium, also known--all amounts from the purchaser. Later subpoenas asked for information about other practices, such as bid-rigging, fraudulent quotes, tying of services, and steering clients to preferred insurers.<sup>41</sup>

Aon's founder and CEO, Patrick G. Ryan, announced his resignation as CEO in September 2004, effective once a replacement was found. Ryan would remain, though, as executive chairman. Despite 40 years in the business, Ryan claimed his resignation had nothing to do with the Spitzer probe or with the conflicts of interest controversy.<sup>42</sup> At the same time, Michael O'Halleran, Aon's President and Chief Operating Officer, who had been specifically named in the New York complaint along with Ryan, announced he would not seek the CEO position.<sup>43</sup> Further, O'Halleran announced he would relinquish his positions, though continuing to work for Aon as a senior executive vice president. The board of directors indicated it would start searching for Ryan's successor and, with O'Halleran making himself unavailable, the board would look for outsiders.<sup>44</sup> It was six months before Aon announced a successor. We discuss the replacement in another section below.

36. *This Summer, Risk Management Magazine Spoke with Patrick Ryan, the Chairman and CEO of Chicago-Based Insurance Broker Aon, About Whether Corporate America Needs New Leadership, His Response to September 11, the Key to Organizational Unity and Strength, the Role of Risk Management Today and its Challenging Future Head*, 49 RISK MANAGEMENT 26 (2002).

37. *Chicago's Aon Seeks to Emerge From Cloud of Insurance Investigations*, CHICAGO TRIBUNE, Dec. 5, 2004.

38. [www.tribune.com](http://www.tribune.com) (May 10, 2005).

39. Judy Greenwald, *Ryan Sees "Indications" Code Wasn't Followed: But Probe has Found no Bid Rigging or Tying, Aon Says*, BUSINESS INSURANCE, Dec. 13, 2004, at 1.

40. Aon's Annual Report on Form 10-K for the year ended Dec. 31, 2004, at 12 (filed on March 15, 2005).

41. *Id.*

42. See, n. 15 above. We wonder.

43. Mark Skertic, *Aon Chief Executive to Give up Post*, CHICAGO TRIBUNE, Oct. 1, 2004.

44. Steve Tuckey, *Aon Founder Pat Ryan Set to Resign as CEO*, NAT'L UNDERWRITER PROPERTY & CASUALTY-RISK & BENEFITS MANAGEMENT ED., Oct. 4 2004.

MarshMac was the first brokerage to fall in the multiple investigations when Spitzer filed suit on October 14, 2004, charging MarshMac's insurance brokerage unit with attempting to increase contingency commissions through bid rigging and steering clients to preferred insurers.<sup>45</sup> Aon issued a press release on the same day, referring to the Spitzer suit against MarshMac as containing allegations

such as soliciting "fictitious quotes," bid-rigging, and accepting payments from insurers not to shop quotes – that would violate Aon policies and that, *to the best of our knowledge, our employees have not engaged in*. As for the practice of brokers accepting compensation for services provided to insurers, such compensation is a longstanding and well-known practice in the insurance industry and is disclosed to clients, as Aon and others have previously noted.<sup>46</sup>

The press release then indicated that Aon was cooperating with Spitzer's office. (Notice the distinction between what *employees* do and what *employing* or *employer* intermediaries do.)

In testimony before a Senate subcommittee in late 2004, Spitzer outlined the evidence of secret payments and kickbacks in the insurance industry.<sup>47</sup> He argued that insurers with "market clout and power" could, and did, pay brokers for "preferential treatment."<sup>48</sup> He called the beneficial relationships "insiders' clubs" whereby such preferences remain hidden from the purchases of insurers. Overall, the

insurance industry is in a "crisis of accountability."

While Spitzer's main focus appeared to be on MarshMac, the world's largest insurance broker, he still pursued the investigation against Aon, the world's second largest insurance broker.<sup>49</sup> Aon did not, or seriously purported not to, see what was wrong. It explained that insurers paying contingent fees to brokers was a "longstanding and well-known practice in the insurance industry."<sup>50</sup>

In a December 2004 statement, Ryan sought to control criticism that contingent commissions would sway Aon's brokers in any way: "I'm very comfortable with our past behavior....You can talk to 1,000 Aon brokers, and I would defy you to find one who would say they ever placed business by steering clients toward insurers because of contingent commissions." "They just don't do it, and they don't get paid that way."<sup>51</sup> However, Aon was already aware that at least some thought contingency commissions were a problem. As of the time of the 12/04 Ryan-for-Aon statement, there was already a class action pending in Cook County, Illinois, that insurers making undisclosed payments to Aon were kickbacks that violated Aon's duties to its clients.<sup>52</sup>

The Aon statement that the use of contingent commissions was a widespread practice is now widely known to be true. Formerly, the practice was generally considered an open secret; of course, even *open secrets* are still truths concealed from some. It was widely known to insurers and brokers, but not by most clients. At least some insureds, who knew a little, did not fully understand the practice. When a reporter in late October 2004 attempted to contact

45. Judy Greenwald, *Ryan Sees "Indications" Code Wasn't Followed: But Probe has Found no Bid Rigging or Tying, Aon Says*, BUSINESS INSURANCE, Dec. 13, 2004, at 1. See Quinn & Hamilton, Essay IV, n.1 *supra*, for details.

46. Aon Press Release, March 14, 2005, [http://www.aon.com/about/news/press\\_release/pr\\_007FC4E6.jsp](http://www.aon.com/about/news/press_release/pr_007FC4E6.jsp) (last visited April 29, 2005). [Italics added.]

47. Statement of Eliot L. Spitzer before the Subcommittee on Financial Management, the Budget, and International Security, under the Governmental Affairs Committee of the U.S. Senate, Nov. 16, 2004.

48. A number of the more well-known, and large, insurance companies are within the top 10 of American insurers in terms of amounts paid in contingent commissions in 2003. These include, in order: Allstate, Travelers, Chubb, Nationwide, CNA, Zurich/Farmers Group, Hartford, American Intern Group, Liberty Mutual, St. Paul Cos. R.J. Lehmann, *Rewriting the Rules: Insurers and Brokers are Forced to Adopt New Policies About Commissions, Disclosures and Even the Size of Their Organizations. Now They Have to Make the New Model Work*, 105 BEST'S REV., at 16 (2005).

49. Joseph B. Treaster & Alex Berenson, *Inquiry is Said to Find Deceptive Practices at Aon*, N.Y. TIMES, Oct. 25, 2004, at C1.

50. Joseph B. Treaster & Alex Berenson, *Inquiry is Said to Find Deceptive Practices at Aon*, N.Y. TIMES, Oct. 25, 2004, at C1.

51. *Chicago's Aon Seeks to Emerge from Cloud of Insurance Investigations*, CHICAGO TRIBUNE, Dec. 5, 2004.

52. Daniel v. Aon Corporation, Circuit Court of Cook County, Illinois (99 CH 11895). First filed in 1999, it was certified as a class action in July 2004.

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brokerage houses to have them comment on the contingent commission controversy, he found none who would comment on the record.<sup>53</sup>

Aon's defensive posture that contingent commissions must be okay since everyone does it crumbled quickly. Shortly after Spitzer sued MarshMac, Ryan announced that his brokerage house would stop accepting contingent commissions from underwriters.<sup>54</sup> An English insurance executive offers insight into why MarshMac and Aon backed down on their contingent commission schemes:

If either Aon or Marsh really believed that contingent commissions and overrides and profit shares were legitimate and not illegal, why use them? If they did believe they were good practice for more than 50 years, why didn't they defend them more rigorously? The fact is they were hard to defend, because they weren't linked to the work that they do.<sup>55</sup>

In other words, if marketers, even generally, somehow secretly deploy a marketing strategy, they at least have doubts about what they are doing.

The revenues Aon will lose from canceling its contingent fee agreements are significant. In 2003, insurers paid Aon \$169 million in contingent commissions.<sup>56</sup> As of September 2004, these contingent commissions represented 1.6% of the company's revenues,<sup>57</sup> and accounted for 18% of Aon's pretax brokerage income.<sup>58</sup> Ryan has declared:

We will work closely with insurance carriers, regulators and other constituencies to establish a new business model that ensures appropriate linkage of compensation to specific, measurable services in a way that is transparent, accepted and understood by our clients. We provide important services on behalf of the underwriters; however, current compensation models must change.<sup>59</sup>

The pain has been, is now, and will be immediate. Aon predicted it would have earned about \$50 million on contingent commission revenue for the fourth quarter of 2004. In the end, Aon's revenues from contingent commissions dropped in 2004 to \$132 million, compared to \$169 million in 2003.<sup>60</sup> Indeed, Aon's quarterly profit for the fourth quarter of 2004 fell 12 percent.<sup>61</sup> Recall that contingent commission revenue is not tied to Aon's service performance for customers and is, thereby, just about pure profit.

Aon has vacillated about what its practices were and how widespread. On December 6, 2004, Ryan publicly stated that the brokerage had "found indications that some employees may have not always followed the brokerage's code of conduct and values."<sup>62</sup> Aon then had a code of business conduct that required employees to "compete fairly and honestly for business. ... Never agree to fix prices, divide markets or engage in any other anti-competitive practices." Just two days later, on December 8, 2004, Aon announced that an internal

53. Sally Roberts, *Three Largest Brokers Cave in on Contingent Income*, BUSINESS INSURANCE, Oct. 25, 2004, at 44.

54. Aon was not the first of the major brokers to cease taking contingent commissions. Willis was the first of the top four global brokers. R.J. Lehmann, *Rewriting the Rules: Insurers and Brokers are Forced to Adopt New Policies About Commissions, Disclosures and Even the Size of Their Organizations. Now They Have to Make the New Model Work*, 105 BEST'S REV., at 16 (2005).

55. Ralph Savage, *Broking - Roundtable: State of the Market - Generation Game*, POST MAGAZINE, March 31, 2005, at 5.

56. Sally Roberts, *Trio of Attorney Generals in Settlement Talks with Aon*, BUSINESS INSURANCE, Feb. 28, 2005, at 1.

57. Sarah Veysey & Peta Miller, *Aon Revamps London Fees; Broker Says it Will Make its Compensation Clear*, BUSINESS INSURANCE, Dec. 27, 2004, at 1.

58. Steve Daniels, *Odd Man In: Does Aon CEO Have the Chops?*, CRAIN'S CHICAGO BUSINESS, April 11, 2005, at 1.

59. Sarah Veysey & Peta Miller, *Aon Revamps London Fees; Broker Says it Will Make its Compensation Clear*, BUSINESS INSURANCE, Dec. 27, 2004, at 1.

60. Joseph B. Treaster, *Aon May Settle Today in Incentive Payment Case*, N.Y. TIMES, March 4, 2005, at C2. Comparatively, Marsh benefited far more than Aon on contingent commissions. Marsh earned \$840 million on contingent commissions in 2003, contrasted with Aon's \$169 million. *Id.*

61. *Aon's Fourth-Quarter Profit Down 12%*, N.Y. TIMES, Feb. 9, 2005, at C4.

62. Judy Greenwald, *Ryan Sees "Indications" Code Wasn't Followed: But Probe has Found no Bid Rigging or Tying*, AON SAYS, BUSINESS INSURANCE, Dec. 13, 2004, at 1.

review showed no evidence that Aon employees solicited false bids, engaged in bid rigging, or committed antitrust violations by tying reinsurance to insurance placements.<sup>63</sup> Making up the corporate mind is not always easy.

In mid-December 2004, Spitzer intimated to reporters that discussions between his office and Aon about potential charges and settlement were continuing.<sup>64</sup> Interestingly, on the opposite page of the *BUSINESS INSURANCE* edition that reported the foregoing comments contains a full page advertisement for Aon. They appear on every page 2 and they take up the whole page. A box in the top right-hand corner of this one page states: "Expertise is the foundation for effective brokerage, but advocacy—putting the client first—is the key to success." In one of the paragraphs of what is evidently an open letter by Ryan to risk managers under a title of "In praise of brokers" provides:

For multinational organizations, a thorough understanding of local regulations is paramount to an effective risk program. Global brokers bring understanding of and access to the global insurance market. The client gets *the best possible placement* in terms of coverage, conditions and pricing.<sup>65</sup>

A later paragraph hints at the purpose of the advertisement. It discusses the recent changes in the brokerage industry about how brokers are compensated and about how the "new world of transparency is a tremendous opportunity for brokers to better demonstrate our value by more clearly defining the services we provide." It then goes on to stress the value brokers can bring to the commercial world.

As the year 2005 began, the investigators continued their thorough review of the documents obtained through the subpoenas. State officials and Aon representatives continued to negotiate. The

Illinois Attorney General joined New York and Connecticut in settlement talks in early February 2005.<sup>66</sup> Then in March 2005, both lawsuits and a simultaneous settlement were announced.

#### Richard Blumenthal

Before we go into more detail about the lawsuits and the settlement, we will provide a short biographical sketch of Richard Blumenthal ("Blumenthal"), the Connecticut Attorney General. In the last essay, we reviewed the professional history of Eliot Spitzer.

Blumenthal has an impressive professional and political resume. He received his undergraduate degree from Harvard and his law degree from Yale. (Spitzer attended Princeton as an undergraduate and then Harvard for law school.) Blumenthal's military background includes being a sergeant in the U.S. Marine Corps Reserve. (Spitzer did not have any military experience.) Blumenthal was then appointed a law clerk for Supreme Court Justice Harry Blackmun.<sup>67</sup> (Spitzer clerked for a federal district judge in New York City.) Blumenthal's political career began early. He was an aide to Senator Daniel Moynihan and an assistant to Senator Abraham Ribicoff. (Spitzer had no such experience.) After a 4-year stint as U.S. Attorney in the State of Connecticut, he was counsel with the NAACP Legal Defense Fund. (Spitzer had a related experience on the criminal law side.) A few years into the NAACP job, Blumenthal was elected as a Representative to the Connecticut House (1984-1987), then a state Senator (1987-1990). With the foregoing recitation, and given the state, it seems obvious that Blumenthal is a Democrat, like Spitzer. (What will presidential primaries look like in 8-12 years, or so?) Blumenthal was first elected as Attorney General of the State of Connecticut in 1990 and has been reelected each time since in 1994, 1998, and 2002. The next election for Attorney General in Connecticut will be in 2006. Blumenthal's office has

<sup>63</sup>. *Id.*

<sup>64</sup>. Douglas McLeod, *Spitzer Hints at Deal with Aon*, *BUSINESS INSURANCE*, Dec. 20, 2004, at 3.

<sup>65</sup>. *Id.* [Italics added.]

<sup>66</sup>. Ameet Sachdev, *Illinois Attorney General Joins Aon Settlement Talks*, *CHICAGO TRIBUNE*, Feb. 19, 2005.

<sup>67</sup>. For a recent study of the late Justice Blackmun, see Linda Greenhouse, *BECOMING JUSTICE BLACKMUN* (2005). The author is a Pulitzer Prize-Winning *NEW YORK TIMES* writer on Supreme Court decisions and history. The book is based on thousands of pages of Justice Blackmun's private papers given to the Library of Congress and opened in 2004.

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been active in a variety of actions, including health insurance fraud investigations, tobacco litigation, welfare reform, enforcing the ban on assault weapons, fighting utility cost hikes, and suing environmental polluters. His official website calls Blumenthal "a tireless advocate for consumers, the environment, our children and the civil rights of Connecticut's citizens."<sup>68</sup> While certainly lagging behind Spitzer, in the amount of country-wide publicity and lagging behind in time in investigating abuses in the financial services industries, Blumenthal is still one of the more prominent attorney generals in attacking American corporations.<sup>69</sup> He has, for years, gotten publicity in New York City and on Wall Street. For instance, he led the states' investigations into the antitrust problems with Oracle's attempted takeover of rival PeopleSoft.

Events in this clash began in the late spring/early summer of 2003. On Friday, June 6, 2003, Oracle offered \$5.1 billion to take over the software maker, PeopleSoft. It did this only a few days after PeopleSoft announced it was acquiring one of its rivals J.D. Edwards for \$1.7 billion. Oracle was also a data base and applications software developer. Its equipment was used by companies in sales, procurement, applied chain-management, manufacturing, and human resources. Oracle was a sizeable company with approximately 42,000 employees at the time. PeopleSoft had only 8,100 employees. In the previous relevant year, Oracle had sales of \$9.4 billion, while PeopleSoft had sales of \$1.9 billion.<sup>70</sup> PeopleSoft rejected the bid.<sup>71</sup> Almost immediately, PeopleSoft sued Oracle.<sup>72</sup> Shortly thereafter, Oracle increased its offer for PeopleSoft from \$5.1 billion to \$6.3 billion.<sup>73</sup> At this point, Blumenthal got involved and filed an antitrust against Oracle. Connecticut alleged that Oracle's acquisition of PeopleSoft would interfere with the state's current computer system conversion

plan.<sup>74</sup> Connecticut officials said that it wanted to block the takeover because the officials believed that Oracle will discontinue the line of PeopleSoft products the state uses and replace them with its own products. According to state officials, that would create a problem for PeopleSoft customers, such as itself.<sup>75</sup> The state of Connecticut Comptroller, Nancy Wyman, an elected officer, said the takeover would create an "enormous and expensive upheaval, and something called Core-CT, which is the state's conversion of its computer system and is a process that was only a month old at the time. She said,

Allowing this takeover to go forward would cost Connecticut taxpayers tons-of-millions-of-dollars at a time when we can least afford it. It would also mean an incredible loss of work and employee training that has been invested in this important project. I am hopeful that the Attorney General's action [i.e., that of Blumenthal] can prevent what would be a terrible waste of time and money.<sup>76</sup>

Fairly obviously, this is quite similar in some procedural respects—more political than technical litigation respects—to the *Blumenthal v. Aon* case which we will be discussing presently.

Blumenthal has continued to pursue the abuses in the insurance industry. He has upset some regulators and some in the insurance industry with his recent proposal for a State constitutional amendment to make the Connecticut Insurance Commission become an elected post, like the Attorney General and the Comptroller, as opposed to an appointed official as is now the case.<sup>77</sup> Presumably, Blumenthal is negatively and electively reacting to the

68. Office of Attorney General, State of Connecticut, <http://www.cslib.org/atygen/mainlinks/linkpic1.htm> (last visited May 3, 2005).

69. *Enemy of the States*, 368 *ECONOMIST* 53 (Sept. 6, 2003).

70. Mike Ricciuti, *PeopleSoft Calls Oracle Bid "Atrocious"*, *NEWS.COM* ([www.news.com](http://www.news.com)) (2003).

71. Dawn Kawamoto, *PeopleSoft Formally Rejects Oracle Bid*, *NEWS.COM* ([www.news.com](http://www.news.com)) (June 12, 2003).

72. Ian Fried, *PeopleSoft Sues Oracle*, *NEWS.COM* ([www.news.com](http://www.news.com)) (2003).

73. Margaret Kane, *Oracle Ups Its PeopleSoft Offer*, *NEWS.COM* ([www.news.com](http://www.news.com)) (June 18, 2003).

74. One wonders if there was any political motivation involved in the filing of this lawsuit. It makes one wonder as well, about the lawsuit to be discussed presently. Clint Boulton, *Connecticut Sues Oracle Over The Bid For PeopleSoft*, *SOMEBODY'S WEBSITE THROUGH GOOGLE* (June 19, 2003).

75. *Id.*

76. *Id.*

current, appointed commissioner who has failed to act in the midst of the scandal in the insurance and brokerage industries.<sup>78</sup> His publicly stated purpose is to bring "accountability" to the post since an appointed official, as is now the case, reports to the state's governor.<sup>79</sup> The proposal has not been accepted by the state's Insurance and Real Estate Committee.<sup>80</sup> The state's House Republican Leader Rep. Robert M. Ward has argued that any political oversight that an elected official would inherently bring to the insurance industry would mean job losses as insurers would inevitably move their operations to other states.<sup>81</sup> (As many lots aware, lots of insurers have home and/or major offices in Connecticut—consider Hartford Insurance.)

This political opposition has led the elected Blumenthal to announce that he would take the proposal to the legislature.<sup>82</sup> He understands this route will not provide a quick resolution, thus suggesting the effort may take two to three years to "build momentum."<sup>83</sup> Some complain that elected insurance-regulatory officials would not necessarily be more independent than appointed ones, because those who would run for the post and would likely solicit campaign contributions from insurers or those closely connected to them.<sup>84</sup> Of course, such elected officials might look for insurance industry jobs later—after gaining and leaving office.

There are other examples of his continued

activism in the insurance brokerage arena. Blumenthal has proposed a legislative bill that would require brokers and agents to inform clients of all insurance price quotes and explain in writing why a particular insurer is recommended.<sup>85</sup> In addition, he is advocating mandatory codes of professional responsibilities for brokers and agents.<sup>86</sup> He is also pursuing the potential of undisclosed payments in the annuity arena. Blumenthal recently subpoenaed records from The Hartford concerning its group annuity business, stating that the investigation was similar to the other investigations involving undisclosed commissions.<sup>87</sup>

Some are worried that active attorney generals, such as Blumenthal, are improperly usurping the role that federal regulators, such as the SEC, the FTC, and the FDA, are mandated to play.<sup>88</sup> Much of some of the last set of so-called criticisms have also been levied at Spitzer. In any event, we move onto the lawsuits against Aon.

#### The Suits

The Attorney Generals of the States of Connecticut, New York, and Illinois, filed suit against Aon on March 4, 2005.<sup>89</sup> Their complaints varied somewhat.

#### The New York Complaint

The New York Attorney General and its Superintendent of Insurance made a number of

77. Diane Levick, *Broker Fees Bill Boosted; Disclosure Rules Move Forward*, HARTFORD COURANT, March 5, 2002, at E1.

78. *Wrong Advice on Insurance Post*, HARTFORD COURANT, March 16, 2005, at A10.

79. Stephen Singer, *Blumenthal Calls for New Insurance Regulations*, ASSOCIATED PRESS STATE & LOCAL WIRE, BUSINESS NEWS, Feb. 9, 2005.

80. *Id.*

81. Diane Levick, *Elected Post? Debate Begins; Insurance Regulator Selection Weighed*, HARTFORD COURANT, March 11, 2005, at E1.

82. *Id.*

83. Diane Levick, *Elected Post? Debate Begins; Insurance Regulator Selection Weighed*, HARTFORD COURANT, March 11, 2005, at E1.

84. *Wrong Advice on Insurance Post*, HARTFORD COURANT, March 16, 2005, at A10.

85. *Id.*

86. *Wrong Advice on Insurance Post*, HARTFORD COURANT, March 16, 2005, at A10.

87. Diane Levick, *Insurer Gauges Accord Costs*, HARTFORD COURANT, April 29, 2005.

88. Mike France, Dan Camey, & Heather Timmons, *White Knights or Loose Cannons? Its State AGs v. Corporate America*, BUSINESS WEEK, June 17, 2002, at 62. One reason that state attorney generals have become so active and so litigious against corporate America is that they have far less red tape in pursuing criminal or civil charges than the federal regulatory agencies. *Id.*

89. Agreement Among the Attorney General of the State of New York, the Superintendent of Insurance of the State of New York, the Attorney General of the State of Connecticut, the Illinois Attorney General, the Director of the Division of Insurance, Illinois Department of Financial and Professional Regulation, and Aon Corporation and its subsidiaries and affiliates (collectively "Aon") dated March 4, 2005. (available at: <http://www.cag.state.ny.us/press/2005/mar/aonsettlement.pdf>, last visited April 1, 2005) (herein, "Aon Settlement Agreement").

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allegations as violations of the state's Executive Law (fraudulent business practices), the Martin Act (securities fraud and securities act violations), the Insurance Law (deceptive and dishonest practices), and common law (unjust enrichment and common law fraud). The New York Executive Law and the Martin Act are discussed in more detail in our previous Essay IV.<sup>90</sup> The Insurance regulators' citation is relatively short at 5 pages, in part as it specifically refers to the allegations contained in longer civil complaint by the Attorney General's office.<sup>91</sup> It also resembles its previous critique of MarshMac. Thus, we will focus on the latter. These included:

- steering client business to preferred insurers;
- promises to steer more business to insurers if the insurer agrees to purchase reinsurance from Aon's reinsurance subsidiaries;
- requesting that an insurer raise its quotes for a certain Aon client and then bragging about how it made Aon a better partner for that insurer;
- having an insurer directly pay the salaries of Aon brokers;
- collaborating with preferred insurers to "freeze out" a competing insurer;
- hiding a lower quote for insurance in lieu of providing the client with a higher bid; and
- allowing preferred insurers with first looks, last looks, and exclusive looks, on preferred business.

The complaint clearly states the alleged motive for such schemes: to make more money. Of course, there is nothing wrong with this concept *per se* in our capitalistic economy. So, the complaint takes pains to point out the harm as two fold: (1) clients had to pay more (2) and they lost the benefit of their bargain with Aon, where Aon did not act with undivided loyalty and objectivity in meeting their insurance needs. In other words, the allegation is greed.<sup>92</sup>

The New York complaint is dramatic in actually naming two of Aon's senior executives as having personally participated in the improper "schemes". First, Ryan is cited as having personally agreed to an improper arrangement with The Chubb Corporation, whereby Aon would steer more business to Chubb, if Chubb purchased reinsurance from Aon's reinsurance subsidiaries. The complaint also states that in 1994 Ryan "allegedly demanded" reinsurance business from CNA Insurance Companies if Aon steered CAN to lines of its retail business, including commercial reinsurance. Secondly, Michael O'Halleran, whom the complaint identifies as "Ryan's second-in-command," is said to have personally negotiated "clawback deals" with insurers whereby Aon's reinsurance unit would provide discounts which Aon could recover through contingent fee arrangements on its placing business with the same insurers. The complaint then cites a direct report of O'Halleran who also participated in steering activities. In other places in the complaint, other individual lesser managers of Aon are also identified by name.

The contingent commission scheme is described as being a central, though undisclosed, facet of Aon's revenue stream. As Aon is paid for its services by flat fee or percentage commission, the contingency monies were obviously a sweet deal as representing almost pure profit. To bolster the contingent commission model, in 2001 Aon formed a small cadre of executives into the newly created and monickered

90. See, *supra* n.1.

91. In the Matter of Aon Corporation, et al., New York State Insurance Dept., filed March 4, 2005; Complaint The People of the State of New York v. Aon Corporation, filed March 4, 2005, Supreme Court of the State of New York, County of New York.

92. Discussions of vices and sins are becoming more and more common, these days, even if socially scientific business studies are not. See, Phyllis A. Tickle, GREED (2004). This book is part of the series published by the Oxford University Press on "The Seven Deadly Sins." One of the most interesting features of this book is to be found in its short collection of figures. One of them is a painting entitled, *The Greenspan Buddab* (2000). Another is a photograph of Zasu Pitts, shown sleeping with her money. This is apparently taken from a film release in 1925, entitled GREED. The Pitts photo is Figure 7. The final of the photos is of Michael Douglas in WALL STREET (1987). We return to this theme in the Conclusion.

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Syndication Group. This band of merry men (or business warrior brothers) was tasked with creating more nationally-based, "preferred partner" relationships tied to lucrative contingent commission machinations. Of course, the insurers were not really Aon's partners. This usage of the word is currently fashionable business rhetoric. A number of communications are provided as examples of the Syndication Group's efforts to both forget these agreements with large insurers, and to instill the message within the brokerage's ranks to steer business toward the preferred insurers. Employees were provided financial incentives to direct business toward the preferred insurers paying the largest contingent commissions to Aon.

In one interesting case highlighted in the Complaint, Aon encouraged an insurer to provide an inflated bid. In 2003, Aon had placed an insurance policy for a company called Pearlstine Distributors, Inc., with Zurich North American Insurance Company ("Zurich"). After binding the policy, Zurich evidently became a bit nervous about the risk, so paid \$18,000 for an excess insurance policy. Zurich expressed its displeasure and Aon agents therefore promised to reimburse them for the extra coverage. An early prospect to do so came up three months later when Fieldstone Investment Corp. ("Fieldstone") hired Aon to obtain workers' compensation coverage. Aon referred it to Zurich, who initially provided a bid of about \$250,000. Before passing the bid onto Fieldstone, Aon pushed Zurich to raise its bid. Zurich complied, giving a new bid of about \$290,000. Aon presented the bid to Fieldstone and it was accepted. Shortly thereafter, Aon employees sent several communications to Zurich that clearly indicate Aon thought that its debt was paid off, to boot, and since Zurich received over twice as much as its extra expense for Pearlstine, Aon was closer to a higher contingency commission payment.

The complaint also outlines how Aon manipulated the market in placing personal lines insurance. Since 1999, Aon worked with Chubb Corporation and Fireman's Fund to place auto and home insurance of executives of its retail clients under a deal in which

the two insurers helped fund the salaries of Aon brokers and paid Aon bonuses for generating more business.<sup>93</sup> Some of the brokers funded in this way were told to seek bids/prefer Chubb and Fireman's Fund, and further, not to waste time in soliciting bids from AIG, then a newly aggressive player marketing personal lines policies. The explanation was that AIG had refused to enter into a contingent commission agreement, so were to be generally disregarded. Chubb and Fireman's Fund were evidently chosen since they are some of the highest paying insurance companies.<sup>94</sup>

One interesting e-mail by a manager in the Syndication Group indicated: "If we approach AIG on all submissions, the reason for carrier choice will always be rate and it will slow submission process." Thus, employees were directed that if they did solicit an AIG quote, they must give Chubb and Fireman's Fund a last look to force them to match or beat the price. In one instance in 2003, a Syndication Group executive penalized an Aon broker who was about to move an account from Chubb to AIG without giving Chubb a last look. The executive wrote that "[t]his is unacceptable." Documents show that in 2000, Aon's then CEO, Ryan, himself, discussed the incentive program directly with the CEO of Chubb. The deal was lucrative for both companies: Chubb wanted more business directed its way by Aon, while Aon wanted Chubb to purchase reinsurance from Aon's reinsurance subsidiary. Handwritten notes from company executives indicate that Aon would reduce the reinsurance rates to Chubb by 50%, with the expectation that it would earn the discount back through the bonuses Chubb would pay for directing business its way. Spitzer has described such an arrangement as a "clawback."<sup>95</sup> So has Blumenthal, as we shall see.

The complaint goes on to outline similar "clawback" arrangements involving Aon's selling reinsurance to an insurer in return for Aon's placing clients' insurance at the same insurer. The others involve Liberty Mutual, RLI Insurance Company, and Travelers Insurance Company.

The last set of facts regards the conflicts of interest

<sup>93</sup>. Joseph B. Treaster, *Aon Inquiry Suggests Problems in Home and Auto Insurance*, N.Y. TIMES, March 7, 2005, at C9.

<sup>94</sup>. *Id.*

<sup>95</sup>. *Id.*

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concerning Aon's employee benefits insurance consulting group. Aon Consulting is paid to advise employers about price and quality of various employee benefits. Again, Aon Consulting's image was crafted around placing the client first and achieving the best results for the client. However, Aon Consulting geared at least some of its recommendations toward companies offering contingent commissions, and particularly, those offering higher contingency commissions. When UNUM Provident Insurance Company ("UNUM") sought to decrease its contingency percentage, Aon Consulting threatened that such a move would mean its consultants would be less likely to present UNUM products to consulting clients.

Time and time again, the complaint hammers on Aon for failing to disclose any of the foregoing arrangements to clients. Aon's staff took great pains to indicate its loyalty and primary focus on client service, yet at the same time were cutting deals with insurers and made it clear without any subtlety, in fact, being pretty blatantly, that insurers had to cooperate with their model or lose business. The vast majority of the allegation appears to be a failure to adequately disclose these other compensatory arrangements. Only a few instances are discussed whereby Aon appeared to outright lie about it when asked [directly] by clients. These generally occurred after the early 2004 public focus on contingency commissions when a few clients asked Aon about whether the broker had also engaged in such practices. Aon's employees denied it on the few occasions listed.

After the lengthy (34 pages) of factual allegations, the five (5) causes of action are very briefly pled. As indicated, they are identical to the MarshMac list, except for the lack of an antitrust claim. Naturally, they are subject to the same critique.<sup>96</sup>

### The Connecticut Complaint

The Connecticut actions listed violations of the Connecticut Unfair Trade Practices Act and the Connecticut Unfair Insurance Practices Act. It utilizes two types. The tone of the complaint is rather chastising, besides being clear and disciplined, though it seeks to paint a picture of corporate greed, over-reaching, and the consequences of a company

exploiting its strength in a consolidated industry. It sets forth—or reproduces—a number of snippets and quotes evidently obtained from Aon, as well as those of insurers, as well as from communications, brochures, and Aon's internet site, among other sources. Near the beginning of the complaint, it highlights Aon's declarations of trust, its statements that its primary commitment is to clients, and its claim of a stellar service record. For instance, here is a quote from Aon's website: "With our expertise around the world, you can rely on Aon to help insure your vision."

The complaint is different than most original petitions in other ways. Its writers clearly attempted to bring some humorous, as well as critical, irony to the story of greed. Many lawyers might disapprove of this highly political pleading philosophy and brand it "flippant". Here are a few of the subheadings:

- "The Insurance Industry—What You Don't Know May Cost You"
- "The Pot of Gold at the End of the Rainbow—Brokers Receive Undisclosed Payments"
- "To Be On A 'Level Playing Field' Insurers Worked To Conceal the Override Payments They Paid The Brokers Like Aon"
- "All Customers Foot the Bill—You Load it, We'll Sell It"

Connecticut's complaint is also interesting in its specificity. Some events and some wrongdoings are both detailed vividly. The vast majority of the document, 25 out of 33 pages to be specific, contains detailed "Preliminary Factual Allegations." Thus, the Connecticut Complaint resembles the Spitzer version, at least in its general outline and structure. It names specific companies that were involved in certain wrongdoings, but it also names some of those clients who were harmed by Aon's practices. We discuss some of these here.

The complaint names Aetna, Inc. ("Aetna") and Anthem Blue Cross Blue Shield ("Anthem")<sup>97</sup> as two of the Aon preferred insurers. Surprisingly, Richard Snook, a Connecticut attorney in the AG's office, did

<sup>96</sup> E.g., with respect to the use of securities statutes, See, Quinn & Hamilton, Essay IV, *supra* n.1.

not make "triple-A" jokes. Aetna and Anthem evidently had agreements whereby they paid Aon additional payments, described variously as "overrides," "bonuses," or "kickers." The complaint calls these agreements merely a "subterfuge" for what were, in essence, "kickbacks" for preference in steering clients their way. The complaint claims that such kickbacks were not disclosed to clients, whose contracts with Aon generally just provided that Aon's compensation would generally come from a flat fee or a percentage commission.

Aon's demands for the extra compensation, while secret from the public, were forcefully conveyed to the insurers. The complaint shows that regulatory officials carefully culled through many documents and selected key points. For example, an internal Aetna e-mail is quoted at length:

Our SE Region Broker Conference at the Cloister was a great success. ...After a nice exchange of comments one of the brokers made a comment that changed the direction of the discussion. ... 'you guys just don't get [it], price and ease of administration is not the issue. ... it's my compensation.' (Emphasis in original.) He then proceeded to describe the special override arrangements he had with [several insurance companies] (all 5500 nondisclosed)...that would preclude him from ever giving us his Life/Disability business. The others around the table chimed in with full agreement.

So, at least that insurer knew the score—at least sort of.

The complaint then outlines how insurers definitely got the message about how to improve their chances at business from brokers like Aon. Anthem

offered Aon an incentive program with a glossy brochure proclaiming: "Now Anthem Gives You More Bonus Potential! Crack the Bonus Vault with your Anthem Large Group Health Sales and the money is yours..." This is hardly the best arrangement when Aon's promise to "place our clients first at all times" and that "[o]ne of our core values is always maintaining a client focus."

The big problem with the preferred arrangements between Aon and its participating insurers is the incentive Aon had to breach its duty of objectivity and loyalty to clients. Aon could, and did according to the complaint, steer business to preferred insurers at higher prices in order to profit, and profit greatly it did from this scheme. Thus, we next turn to the allegations about how these arrangements impacted Aon's performance in providing services to its clients.

In addition to monetary rewards, other incentives were offered to Aon by insurers, such as home electronics, or trips to exotic locales.<sup>98</sup> Again, the complaint is not shy about specifics and names some of these wonderful vacation places.<sup>99</sup>

As previously stated, the complaint contains specific allegations concerning certain clients who were harmed or deceived by Aon's practices. A number of cities were among the customers Aon deceived.<sup>100</sup> For instance, the city of Hartford, Connecticut, had paid Aon up to \$80,000 annually from 1999 to 2003 with the understanding that Aon would help the municipality purchase insurance at the best price.<sup>101</sup> The city sought a variety of coverages for police, fire and sanitation services, for real property, and other governmental services. Instead, Aon furtively solicited kickbacks from the insurers Aetna, Anthem, and Blue Shield of Connecticut, in return for getting Hartford's business.<sup>102</sup> Aetna contends it initially balked at the kickbacks, but eventually relented, in part, because it

97. For a history of these insurance companies, except for Anthem, see, Robert N. Cunningham III and Robert N. Cunningham, Jr., *WITHOUT BLUES: A HISTORY OF THE BLUE CROSS AND THE BLUE SHIELD SYSTEM* (1997). There is only one reference to Anthem. See, *Id.* 241.

98. John M. Moran, *A System of Secret Payments Exposed; Lawsuit Details Aetna's, Anthem's Deals with Broker*, *HARTFORD COURANT*, March 5, 2005, at E1.

99. These are The Hilton at Torrey Pines, California, the Ritz Carlton at Half Moon Bay, California, and the Grand Wailea in Maui, Hawaii. *Blumenthal v. Aon Corp.*, Judicial District of Hartford, State of Connecticut Superior Court, March 4, 2005, at 8.

100. *Insurance Scandal Widens*, *HARTFORD COURANT*, March 9, 2005, at A12.

101. *Id.*

102. *Id.*

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stated that there was no law against it.<sup>103</sup>

The town of Manchester paid Aon an annual retainer to provide consulting services for placing the city's health insurance coverage. Aon did not tell Manchester that it received other compensation for Manchester's business and, indeed, the complaint notes that when a town official asked an Aon representative whether Aon received anything from other sources, the Aon agent said no. This statement was not true since Aon received large payments from Anthem, the insurer of Manchester's health coverage. As the publicity about contingent commissions in the insurance industry proliferated, an Anthem representative in March 2004, evidently faxed a document to a Manchester official for signature in which it purportedly informed the town that Anthem (generically) may have contracts with other parties which may require Anthem to pay incentives or other types of compensation for performance.

Aon's special and lucrative arrangement with Anthem evidently worked. The Connecticut lawsuit alleged that every Connecticut municipality that hired Aon to find health coverage signed with Anthem.<sup>104</sup>

The complaint also outlines Aon's failures with respect to its client, Yale University. How the Connecticut AG could get Yale into its suit is unclear. Yale is a private school, after all, although Blumenthal studied law there. It is also unclear how Snook, the author of the complaint, could resist (though he did) humorous, Yale-based subheadings, or perhaps he considered these:

- The Rich Large Sheep Lost It's Way;
- Gentlemen Sale-Steers Off On A Spreel
- Doomes From Here To Eternity?
- More Unworthy Than Such As We? [or:]
- Brokers: Have Mercy on Such As We! [But, Obviously, Not Both!]
- Bah! Bah! Bah!

One wonders where they went. Surely, the draftsman of the complaint were not misled by Yalee-Blumenthal into giving them up. Nor a chance!

In any case, Aon and Yale had a contract in which Aon's compensation for servicing Yale's insurance needs for its employees was to be an annual retainer paid by Yale. However, Aon had an arrangement with Anthem whereby Anthem would pay Aon a commission. As can be expected, Yale's health insurance coverage was placed with Anthem. The complaint then alleges that in comparing the contract Aon had with Anthem and the contract Aon had with Yale, it appears that Aon was being paid for the same services by both Anthem and Yale. More specifically, both Anthem and Yale paid Aon to help with policyholder communications and resolving claimant issues. Not surprisingly, Aon failed to inform Yale of these arrangements. Further, the complaint makes clear the fiduciary problems in an Aon/Anthem contract. Quoting from the complaint:

[W]hat is unusually problematic and disconcerting about the Anthem contract with Aon is that it requires Aon to 'provide unbiased advice to account holders' and, in the same paragraph, '[e]nsure ... insurance is purchased through Anthem....' [Emphasis in original.]

Aon got a cornerstone of \$45,000 per month from the insurer.

The other problem the complaint highlights is the failure of Aon to disclose all of its compensation in regulatory reporting to any of its customers. Spitzer did not raise the issue. Here, it is. Employers are required by federal law to report on Form 5500 all compensation paid to a broker for the employers' purchase of employee benefits insurance covered by ERISA.<sup>105</sup> Since employers may not have this information, industry practice is for the insurer to fill out Form 5500 on behalf of the employer. The complaint outlines some specific communications whereby brokers, including Aon and MarshMac, pushed to exclude some of the non-ordinary

<sup>103</sup>. *Id.*

<sup>104</sup>. John M. Moran, *A System of Secret Payments Exposed; Lawsuit Details Aema's, Anthem's Deals with Broker*, HARTFORD COURANT, March 5, 2005, at E1

compensation from the Form 5500 filings. This portion of the complaint, more so than the others, uses communications by other brokers to make the case against Aon. It is a story that implies that since other brokers are complaining about keeping amounts off of Form 5500, then somehow this includes Aon as well. While the overall argument in this section about the large brokers attempting to craft compensation arrangements to keep amounts off Form 5500 is compelling, we find it insufficient to actually link Aon into implementing such a scheme. Perhaps the importance of this information to Connecticut officials was not that Aon somehow participated in creating false reports, but that there is some evidence that it wanted to keep these additional forms of compensation secret from clients. We shall return to this in the Conclusion.

Connecticut Attorney General Blumenthal stated that Aon's "scheme distorted and corrupted the insurance market--inflating prices and stifling competition."<sup>106</sup>

The kickback arrangement is also referred to as a "pay-to-play" scheme,<sup>107</sup> since Aon was effectively requiring insurers to provide Aon with direct rewards in return for Aon giving them business. The problem is that Aon's responsibility was to find its client appropriate insurance coverage at competitive rates. Blumenthal, through Snook, also calls these "clawbacks."

Aon's scheme of kickbacks was not limited to commercial insurance. When working with companies to obtain insurance, Aon sometimes offered to

also find personal auto and homeowner's insurance for the companies' executives and owners.<sup>108</sup> Complex, creative linkages, of course, can create profits.

#### Illinois Complaint

We have been unable to locate a copy of the Complaint filed by the Attorney General of Illinois. There is very little detail reporting about it in the news media. Perhaps the subsequent edition, amendment, or revision of this, Essay V, will enable us to provide readers with more details. The following is what we have found.

Evidence revealed by Illinois Attorney General indicated that Aon had undisclosed agreements with preferred insurance companies. In one e-mail described by Illinois officials, a senior executive of Aon admits to favoring certain insurance companies: "We will not make our goals and maximize revenues if we place business with non-partners."<sup>109</sup> Further, there was evidence that Aon would steer business to insurance companies in return for which those insurers would then encourage its retail customers to buy reinsurance from one of Aon's reinsurance units.<sup>110</sup> The Illinois complaint also describes how Aon would steer business to insurance companies in return for the insurers' promise to purchase reinsurance from Aon's subsidiary. The Attorney General's suit contends that these arrangements violate the brokers' legal duty to its clients to recommend "the most appropriate insurance and risk management products."

105. Employee Retirement Income Security Act of 1974. "Federal law requires most private employers to disclose all compensation paid to brokers in connection with those employers' purchase of ERISA-covered benefit insurance for their employees. This information must be reported on Form 5500 and be filed by the employer with the United States Department of Labor. The employer may not necessarily know the specific amounts and types of compensation (i.e., commission, consulting payment, override, communication fees) that the insurer has paid to the broker. As a result, the insurer usually prepares a schedule for the Form 5500 ("Schedule A" or "Form 5500") on behalf of the employer, which reports the amount of the compensation the insurer has paid to the employer's broker." (Pleadings tend not to be perfect from a preparation point of view. The above quotation is found in §41 on p.13. It is the second paragraph in §D of the Complaint, although it is not entitled either "Complaint" or "Petition." Unfortunately, there is a §B; however, there is neither a §A nor a §C.

106. *Insurance Scandal Widens*, HARTFORD COURANT, March 9, 2005, at A12.

107. John M. Moran, *A System of Secret Payments Exposed, Lawsuit Details Aetna's, Anthem's Deals with Broker*, HARTFORD COURANT, March 5, 2005, at E1.

108. Joseph B. Treaster, *Aon Inquiry Suggests Problems in Home and Auto Insurance*, N.Y. TIMES, March 7, 2005, at C9.

109. Illinois Attorney General Lisa Madigan, Press Release, *Madigan, Grillo Announced Civil Suit Against, Settlement Reached with Illinois Insurance Brokerage Firm Aon: Investigation Uncovered Unlawful Contingent Commission Kickback Scheme*, March 4, 2005.

110. *Id.*

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### The Concurrent Settlement

Aon settled with the states of Connecticut, New York and Illinois, in agreeing to pay \$190 million in three payments over 2 ½ years. The \$190 million will be paid into a fund to be used to compensate eligible policyholder clients. Interestingly, the settlement covers the entire U.S., and not just the three states involved. Certainly the state regulatory agencies have the task of creating a formula to determine the amount that each policyholder client is entitled to receive. Based on this formula, Aon must calculate each such payment and notify the eligible recipient by June 30, 2005. Eligible policyholder clients are U.S.-based clients who hired Aon for services related to insurance placement between January 1, 2001 and December 31, 2004 where Aon was entitled to contingent commissions from the insurers for referring such business. Those eligible clients who elect to participate must notify Aon by October 30, 2005 and execute a release of liability. The release does not cover claims related to the sale or purchase of Aon securities.

Monies will be paid out of the fund to the extent it is funded (because of the monetary intake system). If there is money remaining after the full payout of all participating clients, Aon does not receive any refund; instead, the monies are to be distributed to non-participating, but eligible, clients. In an interesting twist, the agreement also states that the amount a non-participating, eligible client can receive from the fund is capped at 80% of the amount Aon originally calculated as their respective share. In other words, eligible clients are told that if they do not sign a waiver, they will be entitled to less money (well, at least under this arrangement). So, this appears to be a state authorized sanction for not signing a full release of liability. As an eligible client, you have the option of not signing the release, but if you choose not to, you will be financially penalized and face the risky prospect of pursuing your full entitlement on your own through other legal measures.

Per the agreement, the \$190 million is not deemed to be a fine or penalty. Aon also agreed that

it would not seek indemnification or other reimbursement from insurance companies or anyone else for the monetary settlement. In some ways, this settlement resembles the Spitzer/MarshMac Settlement, not to mention lots of others.

Despite quickly settling, naturally, Aon did not admit any wrongdoing explicitly, and, indeed, Ryan stated that Aon "did not agree with a number of allegations in the complaints," without specifying which ones.<sup>111</sup> In conjunction with the settlement, there is a statement attached to the agreement that is purported to be a public apology, the contents of which has been reported as this:

As these investigations have revealed, Aon and other insurance brokers and consultants entered into contingent commissions and other arrangements that have created conflicts of interest. I deeply regret that we took advantage of those conflicts. This conduct violated the longstanding principle embodied in our Code of Conduct and Aon's Values Statement that our clients must always come first. Such conduct was improper and I apologize for it.<sup>112</sup>

However, such statement is tempered by his additional public comment that "some of our employees have violated our code of conduct... We don't believe these allegations are indicative of Aon's practices."<sup>113</sup> Blumenthal obviously disagrees. About the same time as Ryan is hedging on how pervasive the misconduct was, Blumenthal announced: "There's no question that these illegal practices were known and sanctioned at the highest levels of the company and were pervasive throughout the organization."<sup>114</sup> We assume Ryan and Blumenthal agree to disagree, despite the settlement.

In addition to the monetary charge, Aon agreed to cease certain business practices and to institute others. These were modeled after the MarshMac settlement terms.<sup>115</sup> These include:

111. Richard Wilner, *Light Sentence—Aon Gets Slap on the Wrist in Spitzer Probe*, N.Y. POST, March 5, 2005, at 19.

112. *Id.*

113. Joseph B. Treaster, *Aon Inquiry Suggests Problems in Home and Auto Insurance*, N.Y. TIMES, March 7, 2005, at C9.

114. Joseph B. Treaster, *Aon Will Pay \$190 Million to Settle Complaints on Bids*, N.Y. TIMES, March 5, 2005, at C3.

- As compensation for purchasing, placing, renewing, or servicing any insurance policy, Aon will accept only a specific fee from the client or a specific percentage commission paid by the insurer.
- Aon will disclose in plain terms the amount of the commission in dollars or a percentage.
- At the end of each year, Aon will inform each client of all compensation it received during the previous year from anyone with respect to the client's policy.
- Aon will not accept any other type of compensation from an insurer, and specifically, not any contingent consideration or payment of employee salaries.<sup>116</sup>
- Aon will not solicit or request any false quotes for insurance placement.
- Aon will inform each client of all quotes, including the terms thereof; it does receive for the client's insurance business.
- Aon will not solicit or accept any promise from insurers or otherwise engage in any preferential treatment from any insurer.
- Aon will not place business through a wholesale broker without the client's specific consent.
- Aon will implement written standards of conduct regarding its new compensation policies consistent with the settlement and will institute employee training concerning

such policies, and other business ethics, antitrust and trade practices compliance and reporting.

- Aon shall not violate specified laws of the States of New York, Connecticut, or Illinois.
- Aon's Board will establish a Compliance Committee to monitor the company's compliance with the compensation policies.
- Any complaint from an insurer regarding compensation will be forwarded to the Compliance Committee.
- Aon must file annual reports with the states of New York and Illinois for five years.

This agreement in many ways resembles the settlement with MarshMac. Some challenge whether the settlement was severe enough. One commentator called it a "slap on the wrist."<sup>117</sup> Another indicates Aon "got off easy."<sup>118</sup> The \$190 million is said to be tax deductible.<sup>119</sup>

While the regulators proclaimed that Ryan issued a public apology, we don't find it amounts to much. It reminds us of a young child forced by a parent to apologize and who then begrudgingly says the words "I'm sorry" but clearly does not mean it. Furthermore, since Ryan is clear that neither he nor the company agree with the veracity of all of the factual allegations but refuses to specify which, we cannot understand exactly what he is apologizing for. Ryan explained that he consented to the settlement, despite the disagreements over the allegations, in favor of "putting this behind us."<sup>120</sup> This is particularly of interest since Ryan is not specifically denying the allegation that he personally arranged a deal with an

115. Michael Ha & Mark E. Ruquet, *Aon Settles Probe for \$190M; CEO Apologizes for Conflicts*, NAT'L UNDERWRITER, Marc 14, 2005, at 6.

116. Oddly enough, Aon is still listing contingent commissions in its most recent financial report.

117. Richard Wilner, *Light Sentence - Aon Gets Slap on the Wrist in Spitzer Probe*, N.Y. POST, March 5, 2005, at 19.

118. San Friedman, *Apology Accepted?*, NAT'L UNDERWRITER, March 14, 2005, at 5; cf. Ralph Savage, *Broking - Roundtable: State of the Market - Generation Game*, POST MAGAZINE, March 31, 2005, at 5 (English insurance brokerage executive indicating the huge settlement numbers are out of proportion considering the brokers thought their contingent commission practice was lawful).

119. *Id.*

120. Michael Ha & Mark E. Ruquet, *Aon Settles Probe for \$190M; CEO Apologizes for Conflicts*, NAT'L UNDERWRITER, Marc 14, 2005, at 6.

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insurer to basically swap retail placements for the purchase of reinsurance. Furthermore, the agreement specifically states that Aon is not disqualified from doing business in any of the three states, which presumably means it is also not disqualified from getting a state's business.

Some argue that a major reason that Aon could get away with its behavior was that since 1984, industry consolidation had reduced competition in the insurance brokerage industry, thereby leaving the remaining few conglomerates with substantial influence.<sup>121</sup> More importantly, by 2004 MarshMac held 40% of the market in placing insurance for corporate America and Aon held 30%, competitive forces that may otherwise have prevented the conflicts of interest were weak.<sup>122</sup>

### Aon's Future

In early April 2005, Aon named as Ryan's successor Gregory Case, a consultant at McKinsey & Co., who counseled insurance companies on business practices, including Aon. The choice surprised many as Case has no apparent experience actually running a company, much less a large company and a public company.<sup>123</sup> Case had, though, headed McKinsey's global insurance practice and at another point its North American financial services sector.<sup>124</sup> In addition, Case served on the consulting firm's shareholder operating committee in charge of managing the big business.

This choice has had supporters and critics. One author wrote that "Aon Corp. is handing the rudder to a public company neophyte at the stormiest point in its history."<sup>125</sup> There is also concern that Ryan's

continuation in what appears to be an active role will not provide Case with true independence.<sup>126</sup> The market did not seem to know which side to take as Aon's share price moved very little after the announcement.<sup>127</sup> For his part, Case argues that Ryan remains a critical player in Aon and that Case himself stipulated that Ryan would have a continuing role to play in Aon's business affairs.<sup>128</sup> Regardless, Ryan would retain a position of power since he and his family control about 11 percent of Aon stock.<sup>129</sup>

Case has received a substantial employment package.<sup>130</sup> He has a 5-year contract with a base salary of \$1.5 million, and an annual incentive bonus of up to \$3.75 million. The first year's incentive bonus is agreed to be not less than \$1.875 million. Aon also gave him a restricted stock award and stock options.

There remain signs that Ryan remains active in his occupation. At a national conference for risk managers in late April 2005, Ryan squared off against MarshMac senior executive Michael G. Cherkasky on the subject of contingent commissions. Cherkasky stated that "I firmly believe the marketplace needs to say 'no' to contingencies." Though, Ryan asserted: "It's a free market... If the buyer says, 'I think it's fine that my broker or agent takes contingent commissions,' then it should be allowed."<sup>131</sup> Though Ryan did indicate there should be transparency in broker compensation. While Cherkasky argued there should be standardization in the industry on compensation, Ryan again argued for a free market. Ryan also showed his continuing influence when he stated absolutely that Aon would remain in the reinsurance market (despite the conflicts of interest). At that same conference, Ryan seemed to refocus the responsibili-

121. John M. Moran, *A System of Secret Payments Exposed; Lawsuit Details Aetna's, Anthem's Deals with Broker*, HARTFORD COURANT, March 5, 2005, at E1.

122. Joseph B. Treaster & Alex Berenson, *Inquiry is Said to Find Deceptive Practices at Aon*, N.Y. TIMES, Oct. 25, 2004.

123. Steve Daniels, *Odd Man In: Does Aon CEO Have the Chops; No Corporate Resume; Ryan Still Down the Hall*, CRAIN'S CHICAGO BUSINESS, April 11, 2005, at 1; Ameet Sachdev, *Aon Selects Low-Profile Outsider as New CEO*, CHICAGO TRIBUNE, April 5, 2005.

124. *Id.*

125. Steve Daniels, *supra* n. 125 at 1.

126. Ameet Sachdev, *supra* n. 123.

127. *Id.*

128. Steve Daniels, *Odd Man In: Does Aon CEO Have the Chops; No Corporate Resume; Ryan Still Down the Hall*, CRAIN'S CHICAGO BUSINESS, April 11, 2005, at 1.

129. Ameet Sachdev, *Aon Selects Low-Profile Outsider as New CEO*, CHICAGO TRIBUNE, April 5, 2005.

130. Aon Form 8-K, April 4, 2005.

131. Sally Roberts, *Cherkasky, Ryan Differ on Compensation Issue*, BUSINESS INSURANCE, April 25, 2005, at 14.

ty for brokers keeping their clients informed. In a discussion about transparency about brokers' commissions and practices, he stated that corporate risk managers "should never put yourself in the position that you can't answer [questions about] what it is you're paying for."<sup>132</sup>

As with any true soldier braving battle and hoping to live another day, Ryan is optimistic. "Aon now has these investigations behind us and can move forward with renewed focus on our clients."<sup>133</sup> Aon got off a lot easier than MarshMac. While MarshMac paid \$850 million to settle the states' suits about its compensation practices, Aon paid \$190 million. Further, while some of MarshMac's executives have faced criminal charges, there is no indication that any of Aon's employees will.<sup>134</sup>

Aon clearly remains a significant and viable player in the insurance brokerage business. Aon continues to employ about 48,000 people around the globe (about 21,000 in the U.S. alone).<sup>135</sup> Aon remains the largest global reinsurance broker, the largest U.S. wholesale broker, and the second largest global insurance broker. Revenues for brokerage services exceeded \$5.7 billion in 2004, while revenues overall exceeded \$10.1 billion in that same year.

Still, with insurance brokering being the most significant portion of its business, even Aon seems concerned about the impact of eliminating contingent commissions. In its most current annual report, Aon refers to such elimination and lists it as a risk to its insurance business:

There is no assurance that we will be able to develop an effective new business compensation model, nor can we assure that any new business compensation model we develop will generate revenues equivalent to those previously receive from contingent

commissions.

Indeed, the change in business compensation model is listed as a factor that could "significantly affect [Aon's] financial performance." Later, Aon lists the change in the compensation model as a new development that "could adversely affect us" in competing in the marketplace.<sup>136</sup>

Despite its initial voluntary repudiation of contingent commission agreements in the fall of 2004, Aon asserts that the \$50 million in net receivables on its books related to contingent commissions as of the end of 2004 remain valid debts that Aon "believe[s] we are entitled to and will collect."<sup>137</sup> Moreover, in its quarterly report for the quarter ended March 31, 2005, Aon booked another \$13 million in contingent commission earnings.<sup>138</sup> We find this position intriguing and appalling. Aon (somewhat) voluntarily discontinued the contingent fee arrangement in October 2004. It purportedly made a public apology. The evidence shows that the lure of getting higher contingent fee revenues altered some decisions by Aon employees that were not in the best interests of the clients. Aon has agreed to huge payouts because of the contingent commission practice. After all that, Aon still maintains that its booked contingent commissions are due, lawful, and fair?

Aon has also undertaken to substantially revamp its business enterprise system by shedding certain business units. There are signs that Aon intends to refocus on its commercial brokerage business.<sup>139</sup> Aon has divested itself of several non-U.S. business units, including its U.K. claims-services business, reinsurance brokerage run-off company, and claims administration services unit.<sup>140</sup>

There are also signs that Aon is reacting to the publicity on other types of conflicts of interest.

132. David M. Katz, *Managing the Risk Manager*, CFO.COM, April 28, 2005.

133. Richard Wilner, *Light Sentence—Aon Gets Slap on the Wrist in Spitzer Probe*, N.Y. POST, March 5, 2005, at 19.

134. Joanne Wojcik, *Aon Sets Up \$190 Million Fund to Repay Clients in Settlement*, BUSINESS INSURANCE, March 7, 2005, at 34.

135. Aon's Annual Report on Form 10-K for the year ended Dec. 31, 2005, at 8 (filed March 15, 2005).

136. *Id.* at 9.

137. *Id.* at 25.

138. Aon's Form 10-Q for the quarter ending March 21, 2005 (filed May 9, 2005).

139. *Perspectives: Brokers' Survival may Hinge on Finding What They Do Best*, BEST'S INSURANCE NEWS, Feb. 28, 2005.

140. R.J. Lehmann, *Rewriting the Rules: Insurers and Brokers are Forced to Adopt New Policies About Commissions, Disclosures and Even the Size of their Organizations. Now They Have to Make the New Model Work*, 105 BEST'S REV., at 16 (2005).

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In November 16, 2004, Spitzer testified before a U.S. Senate subcommittee that brokers engaged in another conflict of interest arising in the reinsurance context. Spitzer outlined the potential for third and fourth bites of the sample apple. The third bite occurs when a broker places reinsurance business whereby the broker may receive a contingent commission from the reinsurer for placing the business. The fourth bite occurs when the broker places business with a reinsurer that is a related company since the broker can profit from its investment interest. Spitzer also complained about brokers locating their insurance (and reinsurance) operations in Bermuda to "evade state regulation." Two weeks after this speech, Aon announced it was selling its interest in Endurance.<sup>141</sup> Endurance Specialty Holdings Ltd., is a Bermuda reinsurer that Aon helped form after the 9/11 tragedy.<sup>142</sup>

Aon faces a host of litigation headaches. Aon recently settled the 1999 suit later certified as a class action in Cook County, Illinois for \$38 million.<sup>143</sup> Other class actions by stockholders are pending, based in large part on making references to Spitzer's allegations.<sup>144</sup> The Department of Labor sent Aon a subpoena in early March 2005 seeking information about Aon's employee benefits business.<sup>145</sup>

In another effort apparently to reduce conflicts of interest, Aon recently announced it might sell its wholesale brokerage business Swett & Crawford.<sup>146</sup> While Aon claims the decision is not related to the law suits, others think it is.<sup>147</sup> The potential conflict arises when Aon owns the retail broker unit and the wholesale broker unit to whom the first refers business. The incentive, perhaps, is that the wholesale broker's additional commission could be the motivation behind a referral. The Aon retail

broker may refer a client to Aon's wholesale broker when it was not necessary or where an outside wholesale broker might charge a lower fee.

Aon has not yet started losing money, as MarshMac certainly has, as we mentioned in the first paragraph of this essay. Reportedly, "its profits increased in the first quarter of 2005 by 18%...."<sup>148</sup> It is a good thing it is an underwriter; i.e., an insurer (or set thereof), as well as an intermediary, since it earned more from its insurance underwriting business.

The next question is: Who is next? For instance, we wonder why the attorney generals or insurance superintendents are not investigating the insurance companies themselves for paying the contingent commissions.<sup>149</sup> One author asks, "how many insurers have benefited from the fact that Mr. Spitzer has focused so far on the intermediaries?"<sup>150</sup> We see two theories. One is interference with contractual relations. If part of the relationship between the insurance broker and its client is to offer objective advice and service in placing insurance, then by agreeing to pay contingent commissions, presumably insurers are interfering, whether knowingly or negligently, with those same contractual terms.

The second theory is based on the contractual relationship between the insurer and its client. We presume, from a financial perspective, that in setting their rates, insurers consider all the costs involved. Contingent commissions seem to increase their costs, particularly as involving certain clients, i.e., the clients referred by the broker. Thus, should we not consider the possibility that insurers are raising their rates because of the contingent commissions? Perhaps they raise their rates on the clients whose business will require the contingent commission. Indeed, the Connecticut complaint suggests that the insurers pass

141. *Clamping Down*, REACTIONS, Feb. 1, 2005.

142. *Id.*

143. David Plumb, *Aon Agrees to Settle Class-Action Suit for \$38 Million*, CHICAGO SUN-TIMES, March 11, 2005.

144. For instance, *Urban v. Aon Corporation* (N.D. Ill.), filed Nov. 2, 2004 (04C 7046); *Roth v. Aon Corporation*,

145. *Aon Says it Received Subpoena from Labor Department*, N.Y. TIMES, March 17, 2005, at C3.

146. Joan Harrison, *Insurance Brokerage Units Hit the Sale Block: Potential Conflicts of Interest and a Softening Market Plague Owners of Wholesale Brokerage Businesses*, MERGERS & ACQUISITIONS: THE DEALMAKERS, April 1, 2005. Wholesale insurance brokers are used by retail brokers to find coverage from special insurers to cover unusual risks. *Id.*

147. *Id.*

148. *Marsh & McLennan Earnings Fall 70% in Wake of Inquiry*, N.Y. TIMES, May 4, 2005, at C6.

149. At least if they have, it has not been reported in the major news outlets.

150. *Industry Proves it's not Above the Fray*, BUSINESS INSURANCE, March 14, 2005, at 6.

on the extra fee to these clients. An Aetna communication is cited: "[A broker] told us to load our rates 5-10% (give him ½) and we'd get all his business. ... Me thinks we need to start getting *more creative*." (Emphasis in original.) Another Aetna manager's notes from a meeting with brokers are quoted: "Their comments: Load the rates for additional comp and you'll start to get business. If the comp is right they will sell the rates." The New York complaint also alleges that "insurers often passed the cost of contingent commissions on to the clients in the form of higher premiums."

Or, perhaps in order to keep the brokers happy with lower insurance rates for those referred clients, the insurers raise their rates on other, non-referred clients. We don't know the answer about who is charged extra by the insurance companies to cover the contingent payments. No one seems to wonder why the regulators don't seem to want to know. We do.

As a purely speculative matter, we suspect rates will go up across the board. We suspect that unregulated rates will go up more than others. We suspect that there will be pressure on state regulators to raise all rates a little bit. There will be especially a strong lobbying led by groups representing intermediaries. The brokerage industry will, undoubtedly, attempt to enlist the help of the carrier industry. The carrier industry will help if there is a danger that the brokerage industry will decline in size, or transform itself in some significant way.

Will the brokerage industry really change? At a broker conference early this year, a CEO of a regional insurer spoke about the new industry rules by which brokers needed to play in terms of disclosure. He advocated disclosure and transparency. However, once he was informed of the presence of a reporter, he balked at speaking on the record.<sup>151</sup> There is very little literature and why there is, and must be, a diversified and huge brokerage industry for American business. A large number of insurance companies have brought adjustment in-house. A large number of liability insurers have brought legal representation of insurer in-house, when insurers are sued. A great many have always had underwriting on the inside and continue to do so. Why is this not possible with

brokerage? It is clear that some of the member of the insurance industry that serve the general public are employing this methodology. Both State Farm and Allstate have done it for many years. Progressive is now doing it with a series of television commercials, inviting people to call Progressive insurance itself and get competing prices. May this not spread to industrial and large commercial insurers? If not, why not?

This section has been entitled, "Aon's Future." We return to this matter in a speculative and highly abstract way in the next section.

### Conclusion

We hypothesize that Aon, like MarshMac, may be facing some significant difficulties. We say this for two reasons. First, some insureds will accept money through state Attorney General sponsored settlements. Some will be class-action members. Some will seek recovery for themselves. This has already happened in the case of MarshMac. We have already indicated that in Essay IV, and we will discuss another exemplary case presently. Second, brokers will probably face difficulties arising from the fact that they have not, at least so far, reorganized their boards of directors who followed the currently rising view as to the need for a new relationship between management and boards. Third, some political controversy is going to arise. We suspect it will hurt the Aon's of the world, and the MarshMac's as well.

Thus, this somewhat expansive or, somewhat speculative-conclusion will have three parts. The first part concerns private cause of action which will be brought to supplement the actions of Spitzer, Blumenthal, and others, such as the SEC. There may be an avalanche of them. To discuss what they might look like, we outline the most recent private cause of action brought against MarshMac. The second part of the conclusion is partially about business ethics. It will raise and embody litigation-related questions. How can the newly advocated approach be advocated if not newly conceived, ideas of management, directors and owners impact litigation against brokers, insurers, and the like. The third part will portray some of the political negotiations as being plotted out against Spitzer mostly.

151. Mark E. Ruquet, *Anonymous Disclosures May Defeat the Purpose*, NAT'L UNDERWRITER, March 14, 2005, at 26.

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### Private Causes of Action

Aside from the already existing private causes of action, Aon has not yet been subject to the substantial private causes of action, whether class actions or otherwise. MarshMac has already been "hit" with a big one: *Fortune Brands, Inc. v. Marsh, Inc.*, which was filed on April 29, 2005.<sup>152</sup> This lawsuit follows, some of the content of *Spitzer v. MarshMac* quite explicitly. The problems of this company with MarshMac and three (3) insurers play an express and explicit role in Spitzer's Complaint against MarshMac.

In the *Fortune Brands* case, the Complaint is relatively short, only 15 pages, and the last page is the signature page. It presents itself as a federal antitrust suit, utilizing the Sherman Act; however, it also tries to state causes of action for fraud, negligent misrepresentation, negligence, breach of fiduciary duty, tortious interference with prospective business relations, deceptive business practices under the Illinois Consumer Fraud Deceptive Business Practices Act, and breach of contract. Naturally, treble damages are sought, as are forfeiture, restitution, actual damages, punitive damages, prejudgment interest, plus attorney's fees. A jury trial has been requested.

Very little is said about what the Fortune Brand company is in the Complaint, except that its principal place of business is Lincolnshire, Illinois. This type of information is not difficult to find these days, however. On its website, Fortune Brands describes itself as distributing three (3) major types of goods: spirits and wine, home and hardware goods, and golf equipment. The first category includes the following: Jim Beam bourbon, Knob Creek bourbon, Dalmore Malt Liqueur, Dekuyper Liqueur, Vox Vodka, and Tsooro Tequila. The home and hardware equipment category includes: Moen Faucets; Therma-Tru Doors; Master Lock padlocks; Waterloo storage; MasterBrand Cabinets, Inc. ("North America's second largest manufacturer of kitchen & bath cabinets"); Aristokraft Cabinetry; Diamond Cabinetry; Omega Cabinetry; HomeCrest Cabinetry; Schrock Cabinets; Kitchen Craft Cabinetry; and Decorá. The golf equipment includes: Titleist (golf balls); Cobra (golf clubs); Scotty Cameron (putters); FootJoy (golf shoes and gloves); and Pinnacle Exception (golf balls).

Thus, there are many different brands and types of items. They can cause a lot of different injuries. Lots of liability insurance is needed, especially—perhaps—for the booze group.

The Complaint thus states that Fortune Brands paid over \$40,000,000 in insurance premiums for insurance policies MarshMac placed in the 1999 to 2004 interval, a period of time during which it "received over \$4,000,000 in fees and over \$800,000 in additional compensation for serving as Fortune Brands' insurance broker." Following the themes in *Spitzer v. MarshMac*, and systematically together with the New York and Connecticut complaints against Aon, it states that MarshMac

promised Fortune Brands during this period that it would act in the best interests of Fortune Brands to obtain cost-effective insurance. It also promised that it would respond truthfully to any questions Fortune Brands had about the amount of additional compensation received by Marsh.

Instead, MarshMac is accused of bid-rigging "by access casualty insurers" and is accused of doing this "[t]hrough the actions of its Global Broking Department in New York". Dramatically, it is stated that, "Fortune Brands repeatedly asked Marsh about the amount of contingent commissions[,] and Marsh repeatedly misled Fortune Brands." This conduct is described as a form of "insurance bad faith," although MarshMac itself is not sued for insurance bad faith. (It could be under the law of statutory bad faith in at least some state jurisdictions; e.g., Texas.)

Fortune Brands asserts that MarshMac has acted as its insurance broker for many years. Apparently, on some occasions, MarshMac "presented client service agreements for signature by Fortune Brands." These agreements contained explicit at least quasi-fiduciary commitments. In 2002, the agreement indicated that MarshMac might "receive contingent commissions from insurers but did not indicate the amount." It did indicate that contingent commissions hinged on volume for profitability from the point of view of the insurer. Subsequently, the proposed MarshMac agreement again indicated that it would receive

152. No. 05C-2579 (N.D. Ill. (2005)).

contingent commissions, but promised to “negotiate on Client’s behalf with insurers and keep the Client informed of subsequent developments.” In addition, and from our point of view, most importantly, MarshMac said that it would “[u]se its *best effort* to place insurance on behalf of Fortune Brands[.]” We think that the idea of *best* in this sort of agreement both emphasizes the fiduciary manner of the relationship and raises the legal standard of satisfactory performance. The provider must not simply do either a not-too-bad-of-a-job or a reasonably good-job, he must do more. Not even “*his best*” will suffice. He must strive to do *the best*. Even then, *his best* might not suffice! Arguably, the provider must be *the best* in the industry.

Fortune Brands was most concerned about excess liability insurance. Apparently, and for obvious reasons, it accounts for “a very significant portion of the insurance premiums that Fortune Brands paid to insurance companies[.]” Given the name of the company, and what has been said about it above, it should be quite clear why this particular company needs enormous amounts of excess insurance, as well as a number of different policies. As the Complaint puts it with restraint, “[i]t is necessary for a company such as Fortune Brands to purchase excess casualty insurance to control the risks to their business from” liability claims of diverse types in massive numbers, not to mention, the huge amounts of money being sought. Interestingly, as we shall see in a subsequent essay, Fortune Brands “purchased its lead layer of excess casualty insurance from AIG during [the relevant] years. AIG was a leading excess casualty insurer in the United States at the time.” AIG is also absolutely enormous in size, in part, because it consists of a number of insurance companies.

In 2002, Fortune Brands employees met with representatives of AIG, Zurich, and ACE, and with representatives from MarshMac. According to the Complaint, the bids were rigged. Indeed, during the course of the bidding, the ACE bid came in somewhat low, and was raised to a higher level, apparently, at the request of MarshMac. Fortune Brands was dissatisfied with the pattern of the bids, but was more or less forced to accept the AIG bid, even though it was

engineered. The Fortune Brands’ Complaint asserts—and implies that this kind of bid rigging constitutes violation of the Sherman Act. It also constitutes actionable misrepresentation. The Fortune Brands Complaint takes considerable delight in reciting various convictions obtained in New York. There were ten (10) in number on the date of the Fortune Brands Complaint, it says.

The foregoing is a brief summary of the Complaint of Fortune Brands. Aon can expect the same sort of complaints, legal criticism, detects from Plaintiff-policy holders. The suit Fortune Brands has brought against MarshMac proves this. One could easily imagine Yale University, for example, following the Connecticut suit against Aon and filing its own suit. Of course, one doesn’t need to be deliberately mentioned in a previous Attorney General lawsuit in order to bring suit against a broker oneself.

#### Business Ethics and Boards of Directors

Business, considered as a social activity and business organizations have not, for very long, or to very great extent, been the objects of objective, empirical, social scientific, or highly rational, sociological inquiry, research, and writing. Of course, there are exceptions, the most famous of which is Robert Jackall’s *MALL MAZES: THE WORLD OF CORPORATE MANAGERS*.<sup>153</sup> This theorizes about, and empirically examines, business executive conduct and consciousness. The conclusions discussed in the book are obvious, given the title; i.e., people do not usually find their way out of mazes. The book is a landmark. It has been widely studied, discussed, respected, and influential for years. It is the sort of thing—and a particular title—which critics of business—either as scholars, writers, sophisticated journalists, or as expert witnesses—must utilize, whether they embrace it or reject it in the end.

Jackall’s discussion is based on a series of lengthy, in-depth interviews he conducted with a variety of business managers. “[O]nly an understanding of how men and women in business actually experience their work, enables one to grasp its moral salience for them. Bureaucratic work shapes people’s consciousness in decisive ways.”<sup>154</sup> Some of these ways are extremely

153. (1988)

154. *Id.* at 5.

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significant:

it regulates people's experiences of time and indeed routineizes their lives by engaging them on a daily basis in rational, socially approved, purposive action; it brings them into daily proximity with and subordination to authority, creating in the process upward-looking stances that have decisive social and psychological consequences; it places a premium on a functionally rational, pragmatic habit of mind that seeks specific goals; and it creates subtle measures of prestige and an elaborate status hierarchy that, in addition to fostering an intense competition for status, also makes the rules, procedures, social contexts, and protocol of an organization paramount psychological and behavioral guides.<sup>155</sup>

When the bureaucratic system is combined with self-interest, all sorts of problems can arise. This is especially true given the old ethics plays in the social life of business:

Managers do not, [at least as of 1988,] generally discuss ethics, morality, or moral rules-in-use in a direct way with each other, except perhaps in seminars organized by ethicists. Such seminars, however are unusual and, when they do occur, are often strained, artificial, and often confusing even to managers since they frequently become occasions for the solemn public innovation, particularly by high-ranking managers, of conventional moralities, and traditional shibboleths.<sup>156</sup>

Management is usually *quite flexible* when it is approached to a variety of things, at least *at the level* of silence. At the same time, more principles are frequently taken to be permanent. Managers are often anxious to find rational solutions, but the problems for which they seek these solutions are frequently of an irrational nature.<sup>157</sup> This combination of situations so often leads to the external wearing of masks, as it were, behind which there are real struggles.<sup>158</sup>

Business management is filled with conflicts, uniformity, and contradictions. On the one hand, "American managers seem regularly to look at the short-term rather than the long run."<sup>159</sup> At the same time, the philosophy worshipped is pragmatism, and<sup>160</sup> it requires looking at both the short and the long run. "[A]deptness at inconsistency without moral uneasiness, is essential for executive success. Over a period of time, in fact, it seems to become a taken-for-granted habit of mind."<sup>161</sup> One wonders if this does not lead to certain kinds of imagination and even meanness. It certainly leads to a form of skepticism, which can have great moral influences. "In a world of cheerfully bland public faces, where words are always provisional, intensions always cloaked, and frankness simply one of many guises, wily discernment, being able, as managers say, 'to separate the honey from the horse shit,' becomes an indispensable skill."<sup>162</sup>

These requirements of business success lead to a certain kind of "psychic asceticism of a high degree[.]"<sup>163</sup> This is not entirely a bad thing, from a moral point of view, since it involves a high degree of self-discipline. Nevertheless, to the extent that this kind of self-discipline is linked to narcissistic self-interest, one wonders if there are not grave discipline implications. "The simultaneous need for self-abnegation, self-promotion, and self-display, as

155. *Id.* at 5-6.

156. *Id.* at 6.

157. *Id.* at 34.

158. *Id.* at 59.

159. *Id.* at 87.

160. *Id.* at 105.

161. *Id.* at 160. (Our question: Is such a state really possible?)

162. *Id.* at 161.

163. *Id.* at 203.

managers work their way through the probationary crucibles of big organizational life, fosters an absorption with self and specifically with self-improvement. Managers become continually and self-consciously aware of their public performances; they measure themselves constantly against others; and they plot out whatever self-transformations will make them achieve desired goals.<sup>164</sup> Predictably, according to Jackall, "psychic asceticism creates a curious sense of guilt, heightened as it happens by narcissistic self-preoccupation."<sup>165</sup>

One wonders if this combination between empirical research and psychological theory is really acceptable or valuable to the expert witness. How will this kind of testimony work in dealing with insurance companies, as with the carriers or brokers. Jackall's psychological analysis is surely not universally accepted as a general theory. In companies, the problem would be enormous, since there are so many differences between adjusters, administrators, underwriters, finance engineers, and so forth. While the organization of brokerage firms is more simple, there must be the same divisions. Perhaps a purer economically oriented sociology expertise might be helpful.

The rather bleak vision of business life contained in Jackall's book is now a fairly standard sociological image of life and business, as well as life elsewhere.<sup>166</sup> The only widely used college-level textbook on the sociology of business hinges on the proposition that "tendencies to do the wrong thing seem to be very wide spread in the United States.... If you think about it, it doesn't seem too safe for you and me to live in

our complex, business-oriented society."<sup>167</sup> According to Professor Caston, of East Carolina University, given the social order, and given that the urge to be creative as part of our human nature, one would expect to see "*creative deviance* whenever opportunities arrive and when there is nothing to restrain us from doing so." Under these circumstances, one would expect to see deviance in great abundance. It should, therefore, be no surprise to find substantial amounts of corruption and socially irresponsible behaviors within the business sector, *or within any other sector*, in society.<sup>168</sup> "We are certainly seeing it in religious circles<sup>169</sup> and legal circles,<sup>170</sup> as well as business circles."

In his textbook, Professor Caston lists nearly thirty (30) major business scandals since the 1970s.<sup>171</sup> Obviously, there are many more since 1988. Professor Caston summarizes the situation:

Deviance is a phenomenon that appears everywhere in society. It is held in check by social control mechanisms, such as are exerted by families, extended kin, neighbors, the community, or church or governmental sanction. As these social control mechanisms have become increasingly splintered by the forces of business-oriented industrialization, an increase in deviance has been a natural corollary. Thus there is so much deviance in society today not because we are different as people from our ancestors, but only because the complexity of our society and its lack of adequate social control mechanisms create an

164. *Id.* at 203-04.

165. *Id.* at 206.

166. See, Kitty Calivita, Henry N. Pontell, and Robert H. Tillman, *BIG MONEY, BIG CRIME: FRAUD & POLITICS IN THE SAVINGS & LOAN CRISIS* (1997). To some extent, this is a sociological study. One of the professors is a professor of "social ecology," whatever that is, if it's not sociology. Some business school research fellows are getting into this area, although their work is often like therapy literature. See, Laura Nash and Howard Stevenson, *JUST ENOUGH: TOOLS FOR CREATING SUCCESS WITH YOUR WORK AND LIFE* (2004). Professor Nash is a widely respected business ethics scholar, but she does not approach organizations as sociologists or lawyer professors do.

167. Richard J. Caston, *LIFE IN A BUSINESS ORIENTED SOCIETY: A SOCIOLOGICAL PERSPECTIVE*, 180 (1998).

168. *Id.* at 181. [Italics added the first time but not the second time in this paragraph.]

169. *Id.* at 175-178.

170. Gene Stefancic and Richard Delgado, *HOW LAWYERS LOSE THEIR WAY: THE PROFESSION FAILS ITS CREATIVE MINDS* (2005). Both of the authors are at the University of Pittsburgh School of Law. Previously they were at the University of Colorado. Both have written extensively on ethnicity and legal theory. Both are currently Derrick Bell fellows at "Pitt." Duke University Press is the publisher of this short book.

171. Caston, *supra* n. 167.

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enormously rich environment for us to engage in creative deviance and for us to get away it. This situation appears to be just one more cause (or opportunity) that derives from our living in a business-oriented, industrial society.<sup>172</sup>

Capitalistically based business societies thus encourage the creative deviance, which is another word for the passionate and clever pursuit of self-interest.<sup>173</sup> How, according to Professor Caston, can this be combated in our society? Interestingly, one of his major suggestions is that it can be done through more owner control of businesses, and that can be accomplished through boards of directors or large corporations.<sup>174</sup> According to him, it can also be done through controlling management, compensation schemes,<sup>175</sup> and controlling management through codes of ethics and ethical training.

Spitzer appears to believe the same thing, given the settlement agreements he is engineering. The other commentators believe that management control must be done through advancements with

respect to boards of directors, and that this is the only way that owner control can be increased as well. As we shall see soon, others subscribe to something else.

This is an extremely serious suggestion. It is not only revolutionary—in some respects—but currently fashionable, at least among some academics. It has had considerable impact on AIG, as we shall see in a subsequent essay, although it has not had much effect on the major and problematic brokerage houses, at least not yet.

One of the major sources of commentary on the increasing need for the organization amongst boards of directors is to be found in *THE RECURRENT CRISIS IN CORPORATE GOVERNANCE*.<sup>176</sup> One of the authors, Paul W. MacAvoy is the former Dean and now the Williams Brothers Professor of Management Studies at Yale University, while Ira M. Millstein, the other author, is a/the Senior Partner of Weil, Gotshal & Manges LLP law firm. Over the years, he has taught corporate government, antitrust, and government regulation at New York University, Harvard Community School of Business, and he is currently a Visiting Professor at the Yale University School of Management.<sup>177</sup>

MacAvoy and Millstein point out that the history

172. *Id.* at 181.

173. To some extent, Professor Caston's idea of a deviance is based upon the idea of incorrigible self-interest. For a long time, this has been part of American philosophy. "[L]ike so many of the Founding Fathers, [Alexander Hamilton] was also a deep student of human nature and knew that there was no more powerful motivator in the human universe than self-interest." John Steele Gordon, *EMPIRE OF WEALTH: AN EPIC HISTORY OF AMERICAN ECONOMIC POWER* 72 (2004). For an extremely vivid case of this in Hamilton's Prose, see Ron Chernow, *Alexander Hamilton* (2005). Citing the British skeptical philosopher, David Howe, he wrote, "every man ought to be supposed a knave and to have no other end in all his actions but private interests[, namely his]." *Id.* at 60.

174. *Id.* at 182-190.

175. Lucien Bebchuk and Jesse Frie, *PAY WITHOUT PERFORMANCE: THE UNFILLED PROMISE OF EXECUTIVE COMPENSATION* (2004) "The problems of executive compensation arrangements... are rooted in board's failure to bargain at arms' length with executives. Greater transparency, improved board procedures, additional shareholder approval requirements, improved board procedures, additional shareholder approval requirements, and better understanding by shareholders of the desirability of various compensation arrangements all can help improve the situation. But these remedies cannot substitute completely for effective decision making by directors striving to serve shareholder interest." *Id.* at 201. This very book was reviewed and discussed at considerable length in *MAY 2005 TEXAS LAW REVIEW* by Stephen M. Bainbridge, under the title *Executive Compensation: Who Decided* 83 *Tex. L. Rev.* 615 (2005).

176. Paul W. MacAvoy & Ira M. Millstein, *THE RECURRENT CRISIS IN CORPORATE GOVERNANCE* (2003). This book was named one of the "2003 Books of the Year" by *THE ECONOMIST*, and it was reprinted in 2004 by the Stanford University Press as a Stanford Business Book.

177. Michael Schrage, *Ira M. Millstein: The Thought Leader Interview*, 38 *STRATEGY + BUSINESS* 83 (Spring 2005). The author Michael Schrage, wrote a short article and conducted an interview with Millstein. Schrage is somehow connected to MIT, and he recently authored *SERIOUS PLAY: HOW THE WORLD'S BEST COMPANIES SIMULATE TO INNOVATE* (Harvard Business School Press, 1999). Obviously, we are mentioning these names in such detail because any one of these three men—MacAvoy, Millstein, and Schrage—would probably be excellent expert witness on the topic which is about to be discussed. There are others, of course; for example, Bebchuk and Frie might also be helpful, except that they are both law professors, the first at Harvard and the second at Cal-Berkeley. Still, as far as being an expert witness is concerned, especially with regard to corporate governments, being a law professor is not the end of the world. Several law professors were recently utilized in the recent trial of the *Disney* case in Delaware. There are other excellent mandates to be expert witnesses, even in insurance cases, so long as corporate government is involved, as we shall see presently.

of corporate governance has evolved from one in which owners controlled, to one in which boards were supposed to control, to one in which managers became a kind of imperial power and boards were limited to a very limited, altogether distant, and not terribly well educated oversight. It's not that board members are usually stupid, or that they know nothing about business in general. They often, however, try to do too many different things at once, are not supplied with enough information, and do not have any extensive knowledge of the industry of the company upon whose boards they sit. We suggest this last point is particularly true for the insurance industry.

The idea of directorial ethics is currently underdeveloped, say the authors, as is the idea of director obligations—whether legal or moral. To be sure, Delaware courts are transforming this process to some degree, and the worshipful character of literature on professional management is declining.<sup>178</sup>

There is a fair amount of empirical research being done on the behavior of boards, the behavior of directors, the influence of ethical codes on boards of directors, and the extent to which the changing desires of substantial shareholders, such as Cal PERS and TIAA-CREF are impacting board behavior. The results are unclear, inconclusive, and somewhat ambiguous. "[C]hanges in board composition do not necessarily produce significant changes in firm performance over time, given no significant correlation between board composition and various measures of firm performance." Millstein attempts to link specific board governance to "corporate performance has...produced inconclusive results."<sup>179</sup> Matters are complicated: "Strategic, managerial and organizational determinacy of corporate performance are complex and interrelated....[F]rom outside the corporation looking in, it is difficult to determine whether active boards have actually been making decisions that could improve managerial performance."<sup>180</sup> One wonders how

these propositions apply to the insurance industry.

Interestingly, in the substantial literature on boards of directors, corporate performance, and senior management, there is very little—virtually no—discussion of the insurance industry and perhaps even less with respect to the large firm insurance brokerage industry. Perhaps there hasn't been time for the latter. Histories of insurance companies tell about boards, but they say very little about board related expectations, charges and company performance. In the more popular, business-oriented media, this is beginning to change a little. For example, there have been several serious discussions of the fall of Maurice Greenberg, but there have been few discussions, but no serious ones with any real depth about the fall of Jeff Greenberg or of Patrick Ryan.<sup>181</sup>

Nevertheless, MacAvoy and Millstein are making significant suggestions and are part of a movement called, simply "New Reforms."<sup>182</sup> Some of the more significant suggestions by these two authors may be quoted as follows:

- a majority of independent directors;
- more rigorous standards for director independence;
- further restrictions on audit committee composition and additional responsibilities for audit committees;
- wholly independent compensation and nominating/governance committees and specific responsibilities for these committees;
- regular sessions of non-management directors, with a designated presiding director;
- regular board and committee evaluations; and

178. The paradigm of this view is Alfred D. Chandler, Jr., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

179. MacAvoy & Millstein, *supra* note 176 at 46-47.

180. *Id.* at 47.

181. Geoffrey Colvin, *First CEO Knockout*, 151 *FORTUNE* 19 (April 4, 2005).

182. MacAvoy & Millstein, *supra* note 176.

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- company specific governance guidelines and codes of conduct and ethics.

One wonders about the idea of independent directors in connection with insurance companies. So many people outside the insurance industry know so little about it. So many inside the industry lack any real depth of knowledge. Therefore, one wonders what the meaning of the word "independent" in the phrase *independent directors* might mean. We also wonder how a code of ethics would be formulated, taught to, as it were, (soaked into, and insisted upon) when it came to directors.

Another interesting suggestion of MacAvoy and Millstein is that Delaware corporate law continues to develop in the moralistic direction it has taken on in the last few years. They suggest, (i) that E. Norman Veasey, the former Chief Justice of the Delaware Supreme Court, has come to be regarded as a national hero; (ii) that corporate law governing directors is taking seriously the law of fiduciaries; and, (iii) that a "Doctrine of Good Faith and Fair Dealing" is being built into the legal regulations controlling directors. This last trend seems especially appropriate in the insurance industry where there is an already substantially developed law of good faith and fair dealing. At the same time, one wonders how that Doctrine would apply, in any clear and understandable way, to directors in relation to corporations, as opposed to adjusters in connection with claimants. Still, the concrete and inspiring idea of a directorial duty of good faith and fair dealing is worth meditating upon and embracing, even if it is not a doctrine of crystalline clarity.

One also wonders how the observations and recommendations of MacAvoy and Millstein would function as expert witnesses utilized in cases like the ones discussed herein. In his avenue with Schrage, Millstein exhibits an element of flexible realism, which doesn't quite appear in the just-discussed book. When should an external director, for example, resign as a protest, critique, or something of the sort? Immediately? Quickly? Soon? Slowly after lots of

arrangements? Not at all? Millstein's conversation contains a number of extremely interesting recommendations, which seem less abstract and less idealistic than some of the others formulated. Here are some:

- If a board likes a CEO, they will tend to go along and hope for the best.

- Skepticism is a good thing. "The more serious the issue, the bigger the problem, the more the board *should* be skeptical."<sup>183</sup>

- CEOs should be treated as managers only, not Board rulers.

- Boards should have their own chairman. The chairman should have both knowledge and power. S/he should not be a current management leader.

- Corporations need to be run for their shareholders, not for the benefit of the employees and retirees, as many companies are which may be counted as "rust-belt industries[.]"<sup>184</sup>

- Senior management needs to learn how to "walk into the boardroom and say, 'we have a major problem; we are in very big trouble.'"<sup>185</sup>

Most managers would prefer to solve the problems themselves without bringing in boards.

- Alfred Sloan once spoke the truth when he said, "If, gentlemen, we've reached complete agreement, let's start over."<sup>186</sup> (Sexist but true.)

- Nobody is smart enough to be sure their answer is the only one.

183. Schrage, supra note 177 at 85.

184. Id.

185. Id.

186. Id. at 86.

•Debates in boards have to be private. "[D]issent and healthy discussions [are] impeded if [they] have to take place in Macy's window."<sup>187</sup>

•Boards from time to time, need their own counsel.

Is this the sort of thing expert witnesses can assert? What about the strangest rules of evidence governing expert testimony? What about *Kimbrow Tire*?

The "New Reform Movement" was recently joined by a publication sponsored by the American Academy of Arts and Sciences.<sup>188</sup> The book is not about any particular industry, and—unfortunately—it does not have an index. Nothing is said about the insurance industry. It does, however, have a series of recommendations under the title of *Report of the American Academy's Corporate Responsibility Steering Committee*. That committee is a larger group than the authors, who provided the book's essays, although many of the authors serve on the committee, too. Some of the most important members of the Steering Committee, who are not also authors in the book, are Alfred D. Chandler, who has already been mentioned, and Felix G. Rihayn, a financier and Ambassador to France for several years. Some of the most distinguished authors are Martin Lipton, a famous practicing New York securities lawyer; Mark J. Roe, of Harvard Law School; Donald C. Langevoort, of the Georgetown Law School; and Geoffrey Miller of Penn Law School and Yale before that, perhaps the leading authority in the country on legal ethics and the law of attorney misconduct. Many of these people are, obviously, excellent choices to be expert witnesses in the kinds of cases discussed in this series of essays. From our point of view, the most important components in the *recommendations for practice* to be found in the Steering Committee report pertain to business ethics. Interestingly, these recommendations blend together ethics and law, thereby making it more possible for (theoretically abstract) legal thinkers to testify as

expert witnesses. Obviously, some of the most distinguished corporate thinkers in America are *not* a part of this team. A particularly good example of this is John C. Coffee, Professor of Law at Columbia University, and a leading expert on corporate affairs.

#### Political Trends?

Fairly obviously, Spitzer is appreciated as a moral crusader. Almost everybody acknowledges that he is putting the stop to a number of deplorable practices, and that he is doing good things. Many would like to see him become Governor of New York, if for no other reason, than it would give him a lot of other things to do and get him off the necks and backs of those who are now suffering and either confused or desirous of an escape. There clearly is a substantial amount of confusion. Senior officials in the insurance industry disagree about what the role of commission should be. In its December 7, 2004 issue, *BUSINESS INSURANCE* ran on its editorial page, a cartoon in which a husband was removing Christmas tree lights all wrapped up together out of a box, marked "Contingency Fees," as his wife stood by drinking coffee and remarking, "Are we going to throw those out or untangle them?" The wife's query marks not just December 4, 2004 but May 15, 2005, (also) which, from the point of view of the MarshMac scandal is a long time.

There is growing grumbling and some neurotic shrieking, about Spitzer's methods, if not his fundamental themes. Here are the remarks of Myron Picoult, an independent insurance consultant in New York, who is the past President of the Association of Insurance & Financial Analysts:

Spitzer and his band of Merrymakers are eviscerating the concept of materiality. If they do not like something, it is deemed as being wrong. They are clearly hung up on the concept of "managing earnings." There, indeed, may have been abuses with finite insurance. The regulatory guidelines and clarity have been murky for an extended timeframe.<sup>189</sup>

187. *Id.* at 86. Millstein goes on to discuss the problems of corporate general's counsels. He counts that as "the most difficult job in America today. The burden on these people is enormous, because they represent the entire company." *Id.* at 86.

188. Jay W. Lorsch, Leslie Berlowitz & Andy Zelleke, *RESTORING TRUST IN AMERICAN BUSINESS* (2005). The publisher is THE MITN PRESS.

189. Myron M. Picoult, *Spitzer's Tactics On Unethical Acts Questionable*, 38 *BUSINESS INSURANCE* 32 (May 2, 2005).

## INSURANCE LITIGATION

Of course, the concept of fiduciary duties is not, has never been, nor never will it be, a concept of mathematical precision and engineering rigor. Nevertheless, the principal core of the attack by Spitzer and others results from breaches of fiduciary duty. Picoult concedes that he himself has been "unflagging in [his] belief that the property/casualty industry model needs reform." So much for consistency. Substitute a passion for eviscerating a concept like *materiality*

Far worse than Picoult's relatively gentle remarks is the hysterical approach of Ernst Csiszar, who recently became and is now the current President of the Property Casualty Insurers Association of America, and who was—until recently—the Insurance Commissioner for the State of South Carolina. The key phrases in Csiszar's remarks at a recent agent conference in New York, involve virtually calling Spitzer a "corporate terrorist," [i.e., the deliverer of *corporate terrorism*], and he suggests that the conduct of Spitzer and other law enforcement officials, "smack of McCarthyism."<sup>190</sup>

It seems just fairly obvious that Csiszar's remarks are probably political chicanery and attention attracting scandal mongering rhetoric of some sort designed to further the interests of his employer. He certainly got publicity. The NATIONAL UNDERWRITER put pictures of McCarthy and Spitzer together on the cover of the May 9, 2005 issue. It does not strike one as the kind of things those dedicated to truth and justice assert, particularly in light of the fact that Csiszar has also stated that Spitzer has found "practices in the insurance industry that are deplorable, but [great Scott] has taken it further[.]" It is not clear what practices Spitzer is focusing on in the insurance industry that are not deplorable. Actually, every major brokerage house has repudiated and abandoned the practice they have used for a number of years, and most of the houses have been quite critical of the practice, although there are exceptions. (Ryan of Aon seems to think the practice, as it previously existed, was and is sound, and should continue into the future. Aon certainly denied any wrongdoing, both in the legal context and others.)

AIG has sacked its patron "saint".

At least, as reported in the NATIONAL UNDERWRITER, Csiszar seems to believe that the investigations of someone like Spitzer should be restricted to criminal activity only and that prosecuting attorneys should never go public with their views, and if they do, they are becoming something like fascists. Civil injustice is not for Attorneys General; silence is their proper political format; and the public interest never invited or is helped by public communication or the PMSS conference.

Thus, Csiszar appears to have said that Spitzer is now "conducting a sham trial through the media." We read newspapers regularly. This claim is simply false. No one who reads papers of any level of sophistication could genuinely believe such a proposition, if they have an ounce of rationality. Spitzer says that what he has described is, "corporate terrorism—using the threat of indictment...There is no due process, and he [Spitzer] is ravaging the industry." The key words here are *terrorism*, plus *threat of indictment*, plus *no due process*, plus *ravaging*. Truth? Injustice? The American Way?

No major insurance entity has yet been indicted. Some people in organizations—10 or so—have themselves pleaded guilty. Neither the charges nor the pleas threaten any lives. The conduct was unlawful. Legal advice was obtained. There are no sentences yet, and pretty much every knowledgeable person knows that they will be relatively light. These people are being used as sources of prosecution knowledge. Such a public use is not uncommon and not terroristic. Subpoenas are being served. Corporate entities are responding, sometimes after some delays and then hostile conversations with lawyers and threats of going to court. Several cases have been filed. Over several independent governmental units are involved at both state and federal levels. They are settled quickly. The language of Csiszar is about as rational as somebody suggesting that because of the spelling of his name, he must behave like a *Czar* or a *Tsar* and hence—therefore—must be analogous to an imperial primitive Russian interested in some sort of totalitarian monarchial

<sup>190</sup> Mark E. Ruquet, *Csiszar Hits Spitzer For 'McCarthyism'*, 109 NATIONAL UNDERWRITER 6 (May 9, 2005). Curiously, right next to this article is a 2-column article on the recent involvement by the FBI in investigating various components of the insurance industry.

control to industry and governance.

There is not the even most remote connection between the kinds of things that Spitzer and his colleagues are doing and the kinds of things that McCarthy was involved in. McCarthy was almost certainly the great U.S. political villain of the 1950s. First, McCarthy was a Redbaiter, from approximately the time of the end of the second World War. He was "crude and boorish."<sup>191</sup> McCarthy was a rather stupid man. He was also "saturnine..., unshaven..., rumpled.... He spent more time playing poker and accepting favors from lobbyist than he did on Senate business. He was a heavy drinker, and he regularly carried a bottle of whiskey in the dirty briefcase that he said was full of 'documents.'" "He bragged about putting away a fifth of whiskey a day."<sup>192</sup>

Eisenhower detested him, though he "did nothing to curb the partisan zeal of other Republicans[.]"<sup>193</sup> Eventually, as a result of McCarthy's behavior in the Army-McCarthy hearings,

Eisenhower played a small role in bringing an end to his career. Although, that role is usually attributed to a soft-spoken, but shrewd and able Boston lawyer named Joseph Welch, who functioned as the Army's Special Counsel. On June 9, 1954, Welch made a complete fool out of McCarthy, who was probably drunk at the time, on national television.<sup>194</sup>

Obviously, the intemperate rhetoric of someone like Csiszar will not shape any part of the American political future, when it comes to an insurance regulation. It is truly unfortunate that sincere people, interested in justice, the finding of facts, and caring about community, have to hear this kind of irresponsible, untruthful, and nauseating nonsense. There is not chance whatever that Csiszar or his type, will ever make credible expert witnesses in any insurance related matter, at any time—ever. Perhaps, therefore, there is a silver lining from an insurance litigation point of view to be reported even about Csiszar's unable indiscretions.

191. Patterson, *supra* note 197.

192. *Id.*

193. *Id.* at 255.

194. *Id.* at 266. See Michael Ybarra, WASHINGTON GONE CRAZY: SENATOR PAT MCCARRAN AND THE GREAT AMERICAN COMMUNIST HUNT (2004).