

Special Edition: October 25, 2004

## **New York's Attorney General Sues Marsh**

New York State Attorney General Eliot Spitzer announced in an October 14<sup>th</sup> press release a lawsuit against Marsh, Inc., the largest insurance broker in the world. The civil complaint, filed in State Supreme Court in Manhattan, alleges that Marsh “. . . steered unsuspecting clients to insurers with whom it had lucrative payoff agreements, and that the firm solicited rigged bids for insurance contracts”. The press release may be found at <http://www.oag.state.ny.us>.

### **The issues**

Rating agencies classify the financial condition and claims paying ability of insurance companies. Risk managers know the importance of seeking timely replacement of an insurer when its ability to pay future claims is uncertain. Mr. Spitzer's allegations have created creditability issues for Marsh which will affect its ongoing activities as an insurance broker. The possibility of losing clients, lawsuits by clients and shareholders and other related matters may have a significant negative impact on Marsh's financial strength.

Marsh will make decisions on how to deal with the aftermath of the Spitzer allegations. On October 15, 2004, Marsh announced “. . . that (it) . . . will immediately suspend its practice of market services agreements (MSA) with insurance carriers”. These changes will help Marsh deal with some of the creditability and trust issues that have arisen because of the Spitzer lawsuit.

Marsh may also be affected by the decisions of others. Key employees may leave if they feel their livelihood is threatened. Other brokerage firms may lure away Marsh employees. Some insurers may not accept business from Marsh. Some clients will change brokers solely as a result of the allegations.

In this newsletter we discuss issues to consider when a risk manager is confronted with how to handle important decisions about critical service providers. These key decisions need to be approached thoughtfully and on a timely basis.

Like any risk management action, a risk manager must be proactive, not reactive. A proactive decision is, by definition, a *timely* decision.

This newsletter is based completely on public information and does not constitute legal advice or strategy. It is to aid risk managers in an orderly approach to the issues raised by Mr. Spitzer's lawsuit. It is not our intent to recommend a specific course of action.

### **Manage the process**

While the allegations made by Mr. Spitzer are very serious, it does not necessarily require a risk manager to immediately decide whether or not to retain Marsh. An orderly inventory of all of the issues needs to be created, reviewed and evaluated to make the best decision for your organization. A decision made too quickly to terminate Marsh may become an expensive and inefficient proposition if the replacement broker is later found to not be up to the task.

A swift decision may be required if the risk manager is responsible for insurance placed for third party beneficiaries, typically for bank trust operations. If it is determined that Marsh did rig bids and cause insurance costs to be higher than market, trust customers may allege that their trustees did not make broker/insurer changes quickly enough resulting in higher than market rates for a period longer than necessary.

### **Share the plan**

The allegations against Marsh need to be *immediately* communicated to senior management and legal counsel. We suggest a white paper outlining the issues be created and shared with senior management. We have created a list of issues to be considered. This is not all inclusive, since each organization has its specific risk management objectives and needs that must be weighed.

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- Does the organization have guidelines on how to respond to allegations of ethical or legal breaches by its vendors or service providers? If so, how and when is the organization to respond?
- Are insurance renewal dates far enough away to allow a wait and see approach by the risk manager? A policy extension may be warranted to provide additional time to decide and implement a plan. Extensions need to be reviewed carefully as suggested below.
  - General liability, employer's liability and umbrella/excess liability: consider the effect of a change on aggregate limits of liability.
  - Workers compensation: a change of policy expiration date may have an impact on the experience rating modification.
- If a brokerage change is required, will it take time away from other important risk management needs? A broker selection process can be time consuming.
- Will insurers be reluctant to accept business from Marsh? If so, will Marsh be effective in marketing your program?
- Do you have any reason to suspect any inappropriate activity by your Marsh service team? First, discuss this issue with legal counsel. If allowed by legal counsel, consider asking your Marsh service team where your organization's account has been marketed (i.e. local Marsh office or service center in another part of the country)
- Ask to see documents related to past marketing efforts such as written proposals from insurers (i.e. competitors as well as incumbents). Ask if any of the insurers participating on your account have a MSA with Marsh.
- Are your organization's risk financing costs comparable with your industry and peer group? This may be a difficult determine as risk managers do not always want or are prohibited from sharing costs.

### Conclusion

Each Marsh client must decide, in light of these very serious allegations, if it can achieve its risk management objectives through continued use of Marsh. A timely, well thought out plan is needed and should be the result of meaningful discussions with senior management.

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This publication is not to be considered the rendering of legal, accounting or professional services.

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