

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

In the Matter of **ST. PAUL FIRE**)
& MARINE INSURANCE COMPANY) Docket No. 3597-SO

SUMMARY ORDER
(Pursuant to K.S.A. 40-2401 *et seq.* and K.S.A. 77-537)

Pursuant to the authority granted to the Commissioner of Insurance (“Commissioner”) by K.S.A. 40-2401 *et seq.* and in accordance with K.S.A. 77-537, the Commissioner hereby admonishes and assesses penalty against St. Paul Fire & Marine Insurance Company (“St. Paul”) for engaging in unfair methods of competition and unfair or deceptive acts or practices in the business of insurance.

Findings of Fact

The Commissioner has been shown the following facts:

1. St. Paul Fire & Marine Insurance Company (“St. Paul”) located at 385 Washington St., Saint Paul, MN 55102, has been authorized to transact and has continuously engaged in transacting insurance business in the State of Kansas since May 06, 1925.
2. On October 13, 2006 the Kansas Insurance Department (“KID”) received a written complaint from Stacy Andreas, Attorney, Lathrop & Gage, L.C. on behalf of Payless ShoeSource, Inc. (“Payless”) against St. Paul.
3. Payless maintained five umbrella excess insurance policies with St. Paul. The effective date of the policies was February 1, 2002 and were renewed annually.

4. The complaint alleges St. Paul wrongfully denial of a claim submitted by Payless on November 3, 2004 arising out of a pending lawsuit filed against Payless by a rival shoe manufacturer, K-Swiss, Inc. (“K-Swiss”).
5. St. Paul admits, in a November 8, 2006 letter to KID one basis for the denial of Payless’ claim was an intellectual property exclusion on the 2003-2004 policy which states:
 - a. **Intellectual Property Exclusion**
 - i. We won’t cover damage arising out of any actual or alleged infringement or violation of any of the following rights or laws:
 1. Copyright
 2. Patent
 3. Trade dress
 4. Trade name
 5. Trade secret
 6. Trademark
 7. Other intellectual property rights or laws
6. On July 7, 2006, Brent Leisenring (“Leisenring”), Paralegal, Lathrop & Gage, L.C. contacted Mr. Martin Hazen, KID Representative, to determine whether Endorsement 40502 ed. 1-80 (“endorsement” or Endorsement 40502 ed. 1-80) which contained the Intellectual Property Exclusion had been approved by KID for use in the State of Kansas.
7. Mr. Hazen responded to Leisenring’s July 7, 2006 letter that the endorsement had not been approved by KID for use in the State of Kansas.

8. In a November 8, 2006 response to an October 20, 2006 KID inquiry by Mr. James Welch, KID CAD Director, St. Paul admits its failure to file the exclusion with KID, stating, “St. Paul acknowledges that the intellectual property exclusion used on the Payless excess umbrella policy should have been filed with KDI [sic], and we apologize to KDI [sic] for the oversight.”
9. As of November 20, 2006, KID records indicate the Endorsement 40502 ed. 1-80 had not been approved by KID.

Applicable Law

K.S.A. 40-216 Business prohibited until certain filings made;

- (a) ...The commissioner may also require the filing of such other documents and papers as necessary to determine compliance with the laws of this state. No contract of insurance or indemnity shall be issued or delivered in this state until the form of the same has been filed with the commissioner of insurance, nor if the commissioner of insurance gives written notice of 30 days of such filing, to the company proposing to issue such contract, showing wherein the form of such contract does not comply with the requirements of the laws of this state; but failure of any insurance company to comply with this section shall not constitute a defense to any action brought on its contracts.

K.S.A. 40-2404 Unfair methods of competition or unfair and deceptive acts or practices, states in pertinent part:

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

- (12) *Statutory Violations.* Any violation of any of the provisions of K.S.A. 40-216...and amendments thereto.

K.S.A. 40-2407 Same; cease and desist orders; penalties; suspension and revocation of license; restitution; modification of order, states in pertinent part:

- (a) If after such hearing, the commissioner shall determine that the person engaged in an unfair method of competition or an unfair or deceptive act or practice, the commissioner shall render an order requiring such person to cease and desist from engaging in such method of competition, act or practice and if the act or practice is in violation of K.S.A. 40-2404 and

amendments thereto, the commissioner may in the exercise of discretion order any one or more of the following:

- (1) Payment of a monetary penalty of not more than \$1,000 for each and every act or violation, but not to exceed an aggregate penalty of \$10,000, unless the person knew or reasonably should have known such person was in violation of this act, in which the penalty shall be not more than \$5,000 for each and every act or violation, but not to exceed an aggregate of \$50,000 in any six-month period.

Conclusions of Law

The Commissioner has jurisdiction over St. Paul and the subject matter of this proceeding and based on Paragraph #1 through #9 enumerated above and the applicable law finds:

- a. Payless held five umbrella excess insurance policies with St. Paul, effective date February 1, 2002 which were renewed annually.
- b. On November 3, 2004, Payless submitted a claim pursuant to the policies as a result of a pending lawsuit filed by K-Swiss against Payless.
- c. St. Paul denied the Payless claim citing the Intellectual Property Exclusion in the 2003-2004 St. Paul Fire and Marine Insurance Company Endorsement 40502 ed. 1-80.
- d. As of November 20, 2006, KID records do not indicate the St. Paul Endorsement 40502 ed. 1-80 was approved by KID for use in the State of Kansas.
- e. In a November 8, 2006 letter to Mr. Welch, St. Paul admits it did not file Endorsement 40502 ed. 1-80 with KID prior to use in the Payless policies.
“St. Paul acknowledges that the intellectual property exclusion used on the

Payless excess umbrella policy should have been filed with KDI, [sic] and we apologize to KDI [sic] for the oversight.”

- f. The Commissioner finds that St. Paul’s failure to file and receive approval of Endorsement 40502 ed. 1-80 with KID constitutes a violation of K.S.A. 40-216.
- g. The Commissioner finds that St. Paul knew or reasonably should have known of the requirement to file and receive approval from KID for Endorsement 40502 ed. 1-80.

IT IS THEREFORE, BY THE COMMISSIONER OF INSURANCE, ORDERED THAT:

Pursuant to K.S.A. 40-2404(12) and K.S.A. 40-2407(a)(1) is hereby ordered to pay a monetary penalty, due and payable to the Kansas Insurance Commissioner on or before the 14th day from the date of this Order in the amount of Five Thousand Dollars and no cents (\$5,000) for its violations of K.S.A. 40-216(a).

NOTICE OF RIGHTS

St. Paul Marine and Fire Insurance Company is entitled to a hearing pursuant to K.S.A. 77-537, the Kansas Administrative Procedures Act. If St. Paul desires a hearing, the company must file a written request for a hearing with:

John W. Campbell, General Counsel
Kansas Insurance Department
420 S.W. 9th Street
Topeka, KS 66612

This request must be filed within fifteen (15) days from the date of service of this Order. If St. Paul requests a hearing, the Kansas Insurance Department will notify the company of the time and place of the hearing and information on the procedures, right of

representation, and other rights of parties relating to the conduct of the hearing, before commencement of the same.

If a hearing is not requested in the time and manner stated above, this Summary Order shall become effective as a Final Order upon the expiration of time for requesting a hearing, pursuant to K.S.A. 77-613. In the event St. Paul files a petition for judicial review, pursuant to K.S.A. 77-613(e), the agency officer to be served on behalf of the Kansas Insurance Department is:

John W. Campbell, General Counsel
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

**IT IS SO ORDERED THIS 30th DAY OF NOVEMBER, 2006, IN THE
CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.**



/s/ Sandy Praeger
Commissioner of Insurance
BY:

/s/ John W. Campbell
John W. Campbell
General Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the above and foregoing Summary Order on this 30th day of November, 2006, by causing the same to be deposited in the United States Mail, first-class mail postage prepaid, addressed to the following:

Mr. Dale J. Evensen, Esq.
Claim Attorney
St. Paul Fire and Marine Insurance Company
385 Washington Street
Mail Code 9275-NB08T
St. Paul, MN 55102-1396

/s/ Zachary J.C. Anshutz
Zachary J.C. Anshutz
Staff Attorney