

Christian Becker, attorney at law, Wilhelm Rechtsanwälte, Düsseldorf, www.wilhelm-rae.de

Insurance broker or referrer? (Regional Court Hamburg as per 30th April 2010 – 408 O 95/09)

1. INTRODUCTION

The insurance industry has been discussing the distinction between the insurance broker and the referrer for a while. The qualification of persons/organisations as insurance broker or as referrer has practical relevance.

Insurance brokers must get officially registered according to the requirements of the Trade Law (“Gewerbeordnung, GewO”) and apply for a license for their brokerage activity. Only those brokers receive the license who prove the required reliability, orderly financial circumstances, sufficient liability insurance coverage and first of all insurance expert knowledge.

Furthermore, insurance brokers must not rebate commissions. This prohibition forbids the insurance brokers to grant the policy holder bonuses before the conclusion of the insurance contract.

Something else applies for the so-called referrer. A referrer must not act in accordance with legal regulations which apply for the broker. Furthermore, a broker may pass on a part of his provision meant for the client to the referrer who named the possible client.

2. CURRENT CASE

The Regional Court Hamburg decided in the first instance (file number 408 O 95/09) whether a nationwide operating coffee producer was dealing as an insurance broker or as a referrer by means of its internet presence.

According to sec. 34 d para. 1 Trade Law, insurance brokers need a license by the Chamber of Industry and Commerce (“IHK”) in charge before starting to work as a broker. Furthermore they must fulfill comprehensive information requirements resulting from the regulation about insurance brokerage and –consultancy (VersVermV).

Someone who procures insurances without being licensed by the Chamber of Industry and Commerce, acts unfair according to sec. 4 No. 11 of the Act Against Unfair Practices (“Gesetz gegen den unlauteren Wettbewerb, UWG”).

He can be ordered to cease and desist according to secs. 8, 3 UWG¹ and risks a fine.

3. FACTS OF THE CASE

In this proceeding which is not legally binding, the claimant was an association with the aim to support fair trade.

The coffee producer named products of insurers on its homepage without obtaining a license of the Chamber of Trade and Commerce and without meeting the information obligations.

The coffee producer offered on its internet page under the category “insurance” insurance contracts sorted by the topics “health, precaution, financial security”. The coffee producer received a premium from at least one insurer in return.

The coffee producer offered the service by recommending two financial precaution products. They were directed exclusively to its clients. The coffee producer called the products low-priced, simple and fair.

Visitors to the page could fill in an online-form to conclude a supplementary dental insurance when meeting specified requirements. Furthermore, they could give a direct debit authorization. The form was located on the insurer’s webpage. The page also showed the logo of the coffee producer.

The claimant asked the coffee producer in written form to refrain from this practice. The coffee producer refused to stop this practice by explaining that he acted solely as a referrer.

Thereupon, the claimant successfully filed an injunction suit.

4. DECISION OF THE REGIONAL COURT

The Regional Court decided that the claimant has a right to refrain the coffee producer from continuing to promote insurances.

The basis for the injunctive relief are secs. 8,3,4 No. 11 of the law against unfair competition (UWG) in conjunction with sec. 34 d trade law (GewO).

The court considered proven that the coffee producer acted unfair according to sec. 4 No. 11 UWG.

¹ Vgl. Dörner in Prölss / Martin, Versicherungsvertragsgesetz, 28. Auflage, § 34 d GewO Rn. 46

The coffee producer acted unfair according to the court's opinion by acting as a broker as per sec. 34 d GewO without holding the required IHK-license and without fulfilling the information obligations according to sec. 11 of the regulation about insurance brokerage and –consultancy (VersVermV).

4.1 Differentiation between insurance broker and referrer

The Regional Court regarded the coffee producer's webpresence as a broker activity and not as a provision of a tip which does not require permission.

4.1.1 Definition of an insurance broker according to sec. § 34 d para. 1 Trade Law (GewO)

In order to evaluate the coffee producer's internet presence, the court applied the definition of an insurance broker as in sec. 34 d para. 1 Trade Law. According to this regulation, someone who professionally acts as an insurance broker or as a representative of an insurance with the aim to conclude insurance contracts.

4.1.2 Definition of the insurance broker according to the Federal Court of Justice (BGH)

Further, the court took the jurisdiction of the Federal Court of Justice into consideration. Hereafter someone is an insurance broker who procures, develops and winds up insurance cover for a third person in total or partly by virtue of a legal power to operate, without being the insured or the insurer².

4.1.3 Definition of the referrer

Hereof, the legally undefined referrer must be differentiated. The referrer needs no license and does not have to fulfill the information obligations. The court defined the referrer as someone who solely procures the interested person to a broker or an insurer. According to the Regional Court, mentioning possibilities to conclude a contract and initiating contracts is no procurement in terms of Trade Law ("GewO"). This applies at least if the mentioning solely constitutes a preparative act and is not intended to result in the interested person's declaration of intent to conclude a contract. A potential policyholder does not expect advisory from a referrer who only passes on contact details³.

² BGH in NJW 1985, 2595 ff

³ LG Wiesbaden in NJW-RR 2008, 1572

For the interpretation of the term “referrer”, the Regional Court also referred to Art. 2 No. 3 UA 3 of the EU Directive on Insurance Mediation 202/92 EG. According to this directive, the casual provision of information in connection with other business-related activities is no insurance brokerage as long as these activities are not aimed at supporting the customer with the conclusion or the execution of an insurance contract.

4.2 The coffee producer’s internet presence as insurance brokerage

The screen-shots of the coffee producer’s internet presence gave the Regional Court an overall impression of a practice which goes beyond those of a referrer. The court rather considered the facts of an insurance brokerage fulfilled.

4.2.1 Not just a preparatory act

The coffee producer’s internet presence was, according to the court’s opinion, not just a preparatory act. The web presence was already aimed at a concrete declaration of intent of the interested persons to conclude an insurance contract. The coffee producer offered concrete insurance contracts and suggested concrete contracts online, promoted insurance contracts and furthermore acted in return for payment and thus fulfilled the constituent facts of an insurance brokerage.

4.2.1.1 Brokerage by means of suggestions and recommendations

On the one hand the defendant suggested concrete insurance contracts on its webpage. The coffee producer suggested among others and according to the court products A and B for financial precautions. Furthermore, the coffee producer recommended those as low priced, simple and fair.

4.2.1.2 Brokerage by indicating and offering the possibility to conclude

At the one hand the coffee producer advised that interested persons could conclude, if certain conditions are fulfilled, a supplementary insurance contract by using an online-form. This form could only be used after clicking on it and then being transferred to the insurer’s webpage. But this page still showed the coffee producer’s logo. Interested customers could though not realize that they had changed from the coffee producer’s page to the insurer’s page. The content of this page, on which customers conclude concrete insurance contracts, had to be considered according to the Regional Court. By indicating the supplementary dental insurance, the coffee producer thus recommended a concrete insurance product and offered the possibility to conclude a contract.

4.2.1.2 Brokerage by promotion

Furthermore, the coffee producer gave details on the insurer's products on its webpage and promoted them as especially low-priced.

4.2.1.3 Brokerage against payment

The payment received in return also indicated that this practice was an insurance brokerage according to the Regional Court's point of view.⁴

All this allowed the Regional Court the conclusion that the coffee producer acted as a broker and not as a referrer.

Due to the missing IHK-license before starting the brokerage activity and since no information had been issued in accordance with sec. 11 of the regulation about insurance brokerage and – consultancy (VersVermV), the Regional Court assessed the conduct as unfair trade and requested the coffee producer to refrain from this practice.

5. CONCLUSION

The differentiation of the insurance broker from the referrer is difficult. This requires an evaluation of the individual case. Whether appellate courts will construe the “insurance broker” extensively and use a narrow interpretation of the “referrer”, remains to be seen. From the consumer protection's point of view, this can be expected.

In principle, the system of legal regulations does not provide for a “referrer”. This is last but not least in favor of the policyholder's protection. The insurance brokerage shall, as desired by the legislator, be performed by qualified experts, the insurance brokers. The referrer shall only be admissible in exceptional resp. individual cases.

Christian Becker
Attorney at law
Attorney at Law specialized in Insurance Law

Wilhelm

⁴ Vgl. though Dörner I.c. No. 7, hereafter the payment of a provision does exclude the qualification as a referrer

WILHELM

R E C H T S A N W Ä L T E

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Partnerschaft von Rechtsanwälten
Fürstenwall 63
40219 Düsseldorf

Telephone: + 49 (0)211 687746 - 14

Telefax: + 49 (0)211 687746 - 20

www.wilhelm-rae.de

christian.becker@wilhelm-rae.de

Registered office: Düsseldorf - AG Essen: PR
1597