



Bur. Ins. Jan. 15, 2004); *Bonville d/b/a NCT v. MEMIC*, No. INS-00-14 (Me. Bur. Ins. June 20, 2000).

An adjudicatory hearing was held before the Superintendent on June 1, 2004.<sup>1</sup> Gary Lonsinger, the producer who handled the application, testified on behalf of the Ford Agency, and Craig Reynolds, MEMIC's Product Development Manager, testified on behalf of MEMIC. Based on their testimony and the documentary evidence they presented, the following facts appear to be undisputed. Terravecchia Building has its principal office in Kittery, Maine, but is a New Hampshire corporation doing business primarily in New Hampshire. On April 19, 2002, Terravecchia Building applied through the Ford Agency for workers' compensation coverage. Separate applications were made for Terravecchia Building's Maine and New Hampshire operations, with the Maine coverage to be written by MEMIC. Coverage needed to be effective the next day, and the application was filled out late in the afternoon. Mr. Terravecchia and Ms. Bates did not want coverage on themselves, only on their employees, so Terravecchia Building indicated on its MEMIC application that both owners were to be excluded from coverage. Mr. Terravecchia and Ms. Bates filled out waiver forms which were enclosed with the application and intended for submission to the Workers' Compensation Board.

Both the waiver forms and the application were incomplete, so MEMIC requested additional application information and sent the waiver forms back to the Ford Agency for correction. MEMIC's request, received by the Ford Agency on May 3, included a handwritten note: "Need stock numbers completed on waivers & then forward to state. Send us a copy of the approved waivers when received." "Stock numbers" referred to the line on the waiver form requiring the applicant to list the total number of shares of stock issued by the corporation and the number of shares owned by the applicant. The Ford Agency responded by fax on May 17, supplying the information requested by MEMIC and making some additional corrections. MEMIC did not advise the Ford Agency of any remaining deficiency in the application.

However, after conducting the final premium audit the following spring, MEMIC ascertained that no waivers had been filed with the Workers' Compensation Board. On June 19, 2003, MEMIC billed Terravecchia Building \$2173 for coverage on Mr. Terravecchia, due by July 14, waiving the charge for coverage on Ms. Bates upon determining that her Maine risk was *de minimis* because she did not work on Terravecchia Building's one Maine carpentry project during the policy term. The Ford Agency then verified that the Workers' Compensation Board had no record of waivers on coverage having been filed by Mr. Terravecchia or Ms. Bates, nor had MEMIC ever issued an endorsement excluding coverage on Mr. Terravecchia or Ms. Bates. On August 5, 2003, the Workers'

Compensation Board did approve waivers filed by Mr. Terravecchia and Ms. Bates, and MEMIC has issued an exclusionary endorsement to Terravecchia Building's 2003-04 policy.<sup>2</sup>

### ***The Waiver Forms***

The only material factual disputes relate to the waiver forms and what happened to them. Photocopies of three different versions of the same pair of waiver forms were placed in evidence by the Respondents. On their face, they appear to represent three stages of completion of the same documents, and I find that this is indeed what they were, although the Ford Agency disputes that chronology, as will be discussed below. The first pair of waiver forms, according to Mr. Lonsinger's testimony, was from his files and according to his records was part of the application materials as initially submitted on April 19. Both forms were missing the numbers of shares of stock, consistent with the testimony of both Mr. Lonsinger and Mr. Reynolds. In addition, although both forms were signed, Ms. Bates's was undated.

The second pair of waiver forms was introduced, with minor variations,<sup>3</sup> by both Respondents. Each form was signed and dated 4/19/02. The numbers of shares of stock were still missing from both forms, but each form had a handwritten note "(numbers not percentages)" next to the section for shares of stock on each waiver form. Mr. Reynolds testified that its copies came from MEMIC's files, that the notes were written by a MEMIC underwriter, and that according to MEMIC's records, this was how the forms appeared at the time they were sent back to the Ford Agency to be completed.<sup>4</sup> Mr. Lonsinger testified that he obtained his copies after the policy expired from Dun & Bradstreet, the collection agency engaged by MEMIC when Terravecchia Building refused to pay the disputed premium.

Finally, the third pair of waiver forms was identical to the second, except that the numbers of shares of stock had been filled in so that the forms recited that Terravecchia Building issued 100 shares of stock and that Mr. Terravecchia and Ms. Bates each owned 50 shares. The central factual dispute in this case is when MEMIC first received these forms.<sup>5</sup> Although MEMIC had requested that the Ford Agency send the completed waiver forms "to the state," Mr. Lonsinger testified that it was common practice to send the forms to the insurer, as he had done the first time, and for the insurer to forward them to the Workers' Compensation Board. Therefore, according to Mr. Lonsinger, the Ford Agency faxed completed waiver forms to MEMIC on May 17, 2002, as part of its response to MEMIC's request for additional information. He testified that he filled in the missing numbers himself based on information supplied by Ms. Bates. Mr. Reynolds, on the other hand, testified that MEMIC first received these pages much later, from the Bureau of Insurance, as part of the

documentation provided by Terravecchia Building in support of a consumer complaint that it had filed regarding the premium dispute.

MEMIC contends further that this factual dispute is irrelevant, because the instruction to send the forms to the Workers' Compensation Board rather than to MEMIC absolved MEMIC of any duty to forward the forms to the Workers' Compensation Board and even of any duty to tell the Ford Agency that it would not forward the forms to the Workers' Compensation Board. According to MEMIC, that was the responsibility of the producer and the applicant, not MEMIC's responsibility. Mr. Reynolds testified that MEMIC used to accommodate such requests as a matter of customer service, but there had been a change in MEMIC's customer service philosophy. To say the least, that is not the way to build or maintain productive relationships with policyholders and producers. Furthermore, MEMIC's efforts to disclaim all responsibility and shift it to its producers nearly had the opposite effect in the context of this case, by distracting attention from the real issues and focusing attention on the hypothetical scenario in which MEMIC had received the completed waivers in 2002 and failed to respond.

However, the question before me is not what MEMIC should have done if it had received the completed waivers in 2002, because it is clear from the evidence adduced at this hearing that MEMIC did not receive the completed waivers in 2002. According to the testimony of Mr. Reynolds, MEMIC's files show that what it received on May 17 was a 4-page submission, admitted into evidence as MEMIC Exhibit 5, consisting of a cover memo appearing to be on Ford Agency stationery, a copy of MEMIC's request for supplemental information, and two application pages supplying the information MEMIC had requested. I find this document to be authentic, and therefore, since there is not a shred of evidence that the Ford Agency might have submitted the completed waiver forms to MEMIC at any other time, I also find that MEMIC never received completed waiver forms at any time during the policy period.

### ***The May 17 Fax Transmission***

The Ford Agency challenges the authenticity of MEMIC Exhibit 5 on two grounds. One is the testimony of Mr. Lonsinger that he arranged for the waivers to be completed in response to MEMIC's request, and that the agency's files "indicated" that the May 17 fax submission to MEMIC included those completed waiver forms. However, the only document offered by the Ford Agency supporting such an "indication" was a memo which Mr. Lonsinger testified that he sent to MEMIC more than a year later, on August 12, 2003, asserting that all the information requested by MEMIC, including the number of shares owned by each shareholder, "was returned via fax on May 17, 2002." Mr. Lonsinger's memo begins: "Attached you will find copies of all of the files dating back to the original

submission on this account," but the Ford Agency did not provide any of the attachments at the hearing. Mr. Lonsinger also testified that "Our fax machine showed that there were four sheets of paper sent. And the revised waivers were attached, our copies were attached, to that transmission," but did not describe how or when they were attached, nor, again, did he produce any copy of any such attached documents.

After Mr. Lonsinger had finished testifying, Mr. Reynolds offered MEMIC Exhibit 4 into evidence, which is the source of the two completed waiver forms that are in the record. The first two pages of this document match the fax cover memo and the first application page in MEMIC Exhibit 5.<sup>6</sup> The next two pages are the completed waiver forms described earlier, and the final page is a fax journal sheet from a 4-page fax transmission at 4:08 p.m. on May 17, 2002. The date and times on the journal sheet match the fax headers on MEMIC Exhibit 5, and the recipient phone number matches the fax number on the MEMIC letterhead on several documents. Mr. Reynolds described MEMIC Exhibit 4 as "what Gary was saying was sent to us" by the Ford Agency on May 17. The Ford Agency did not object to the admission of MEMIC Exhibit 4.

At the hearing, however, the Ford Agency offered no evidence or argument definitively addressing, either way, whether or not MEMIC Exhibit 4 was what the Ford Agency had faxed to MEMIC on May 17; whether or not MEMIC Exhibit 4 matched any documents at all in the Ford Agency's files; or even whether or not the Ford Agency had ever represented to MEMIC or to the Bureau of Insurance that documents substantially similar to MEMIC Exhibit 4. Mr. Lonsinger conceded, rather, that "The waivers having Karin's date on it, and the number of shares owned by them 50-50, I can't certify that they went back to MEMIC, at all," and that "I don't have any confirmation in our file showing that MEMIC got the revised waivers, the fully completed waivers, other than the fact they didn't come back to us." The evidence shows, however, that MEMIC did not reply because there was nothing for MEMIC to reply to.

One undisputed fact that is strongly corroborated by Mr. Lonsinger's testimony, and also by the journal sheet in MEMIC Exhibit 4, is that the Ford Agency sent a four-page fax to MEMIC on the afternoon of May 17, 2002. Mr. Lonsinger also testified that after the May 17 fax, MEMIC did not renew its request for information, and MEMIC corrected the spelling of "Terravecchia." This strongly corroborates the authenticity of the two pages that are common to MEMIC Exhibits 4 and 5. The first was the cover memo which Mr. Lonsinger did not deny came from the Ford Agency and which said "Please notice correct name spelling of Terravecchia Building and Restoration, Inc." (*Emphasis in original*) The second was a corrected first page for Terravecchia Building's application, dated May 20 and providing most of the information that MEMIC had requested.

What of the other two pages of the four-page fax? Can they possibly be the waiver forms? One page of Exhibit 5 appears on its face to be a copy of MEMIC's April 30 information request, date-stamped as received by the Ford Agency on May 3. There is no dispute that this was in fact a copy of MEMIC's information request. Although it was not necessary to include a copy of the original request with Terravecchia Building's response, it was not unreasonable. Furthermore, one of the items of information requested by MEMIC was prior coverage information. This appears on the other application page included in Exhibit 5, and the parties agree that the May 17 fax provided MEMIC with all the supplemental application information requested. Thus, even if the copy of the coverage request were not part of the May 17 response, the other three pages were all necessary in order to provide the information the parties agree that MEMIC received, and there were two waiver forms and only one other page. Thus, taken as a whole, Mr. Lonsinger's testimony fully corroborates the authenticity of MEMIC Exhibit 5.

### ***The Missing Date***

The Ford Agency's other challenge to the authenticity of this Exhibit rests on suspicions it voiced about the authenticity of the second pair of waiver forms. When cross-examining Mr. Reynolds, Mr. Lonsinger expressed concern about the discrepancy between the undated waiver form executed by Ms. Bates, which Mr. Lonsinger testified came from the copy of the original application in the Ford Agency's files, and the dated waiver form which Mr. Reynolds testified came from the copy of the information request in MEMIC's files, and which Mr. Lonsinger also testified that he had received from Dun & Bradstreet in the course of the premium dispute. Mr. Lonsinger said "The 4/19 date really bothers me.... That creates a problem in my eyes in that, is somebody trying to cover up something? ... somebody else in the organization saying Jeez, you know, I've made too many mistakes, and if I make another one, I'm just going to say I never received them." When Mr. Reynolds asked Mr. Lonsinger, "What bothers you about it?" Mr. Lonsinger responded: "That somebody in MEMIC threw something through a copier to blank out the stock just to cover their tracks."

There is no dispute over the authenticity of the date in the second and third forms, which Ms. Bates testified that it was in her own handwriting. The suspicions raised by the Ford Agency, rather, are that the "second" pair of forms was actually created from the "third" pair of forms rather than vice versa, by blanking out the number of shares of stock, because the Ford Agency's records indicate that only the second set of forms they submitted were dated by both owners. Thus, if MEMIC had a form dated by Ms. Bates in its possession, and the first set of waiver forms was not dated, that would demonstrate that MEMIC did indeed receive another set of waiver forms.

The coverup theory is implausible, if for no other reason than that MEMIC would have nothing to gain and everything to lose. Everyone agrees, after all, that the Ford Agency submitted defective waiver forms with their original application. Why would MEMIC go out of its way to present fabricated evidence of something nobody denies? There would be more motivation for the Ford Agency to alter the form in its application file in order to manufacture a discrepancy between the application it claimed to have sent and the application MEMIC claimed to have received. But that scenario is almost as implausible, especially since neither document shown any sign of alteration and such an amateurish plan would be unlikely to involve a relatively professional forgery.

There is a far more obvious answer, and I find that this is more likely than not what happened. Ms. Bates dated the form "4/19/02" on April 19. After the application was photocopied for the Ford Agency's files, but before it was mailed, somebody noticed the missing date and Ms. Bates filled it in. This is consistent with Mr. Lonsinger's testimony that he was the one who filled in the missing shares of stock on the waiver forms, since Ms. Bates could have done this herself if she had come back to the office in person rather than supplying all the missing information over the phone. Not surprisingly, Ms. Bates testified that she could not remember when she filled in the missing date, since she had no reason to believe that would be a significant event until much later, perhaps not until the hearing this month.

Although Mr. Lonsinger testified that his agency always photocopies their applications immediately before they mail them, he also conceded that there had been some quality control problems with this particular application, in particular that "They omitted to put in the number of shares of stock, and my assistant in the office didn't catch that." He began to testify about what happened "when I ran it through the copier," but corrected that to say "my assistant ran it through the copier." It is not clear how much of Mr. Lonsinger's testimony is based on any personal recollection – of events which took place two years in the past and which, as mentioned above, must have seemed perfectly routine at the time they occurred – and how much is based purely on his review of agency files and his knowledge of agency practice. Mr. Lonsinger's entire testimony regarding the events of April 19 could just as well have been delivered, word for word and in the identical manner, by a colleague who had reviewed the Terravecchia Building file but was not even in the office that day.

Thus, the only evidence with any persuasive power that the copy of the waiver form from the Ford Agency's file is an accurate copy of the waiver form that was mailed to MEMIC is the mere fact that it appeared in the Ford Agency's file where one would expect to find a copy of the waiver form that was mailed to MEMIC. This is circular reasoning, given the other

documentary evidence that it was not an accurate copy. It is possible that the assistant who ran the application through the photocopier was the same assistant who neglected to check the number of shares of stock before letting Mr. Terravecchia and Ms. Bates leave, so I cannot conclude that the assistant could be depended upon with a confidence level of 100%, late on a Friday afternoon, to take the time to do a replacement page for the file merely because one of the applicants had filled in a missing date next to her signature.

In summary, I find that it is more likely than not that all three sets of waiver forms are what they purport to be: the first set is from the Ford Agency's record of what it sent MEMIC on April 19 (although a minor correction was made before the application was actually mailed); the second set is what MEMIC sent back for correction on April 30; and the third set had the stock ownership information completed by Mr. Lonsinger based on information he had obtained from Ms. Bates. However, when Mr. Lonsinger filled in that information remains a mystery. Given his inability to recall with certainty or produce documentation regarding whether the waiver forms were part of the May 17 fax transmission, his recollection that he finished filling out the waiver forms on or before May 17 must be treated as equally uncertain. For purposes of this case, it suffices to ascertain that whenever the waivers were finally completed, and whatever happened to them afterwards, the overwhelming weight of the evidence demonstrates that the completed waivers were not sent to MEMIC at any time during the 2002-03 policy period.

### ***The Duty to Follow Up***

Those factual findings by themselves do not conclusively resolve who is responsible for failing to get Terravecchia Building the coverage it had requested (or more precisely, for selling Terravecchia Building coverage it had not requested). The Ford Agency conceded that Mr. Lonsinger could not "certify" that the waiver forms were actually sent to MEMIC, but argues that even if – as I have found – they were not sent, the Ford Agency still reasonably relied on MEMIC's failure to indicate that there was anything wrong with the submission.

The problem with that argument is that the reason MEMIC did not indicate that there was anything wrong with the submission was that there was nothing wrong with the submission. On May 3, 2002, MEMIC instructed the Ford Agency to "Please respond to the following requests for additional information within **15 days or we will be forced to issue a direct notice of cancellation.**" (*Emphasis in original*) The Ford Agency provided all the information requested, and MEMIC revised the policy accordingly rather than issuing a notice of cancellation.

The only items mentioned in MEMIC's request that the Ford Agency did not provide were, of course, the waiver forms. However, MEMIC did not ask for the waiver forms to be sent to MEMIC. Those were to be sent to the Workers' Compensation Board, and the Ford Agency was asked to wait for confirmation from the Board and then forward copies of the approved forms to MEMIC. Furthermore, the waiver forms were not essential to the issuance of the policy, only to the issuance of the exclusionary endorsements. The Ford Agency did not follow up on its own request for the exclusionary endorsements, and they were never issued. On cross-examination by MEMIC, Mr. Lonsinger agreed that an agency should have reminder procedures designed to prevent this from happening, and provided assurance that the Ford Agency did have such procedures in place. However, Mr. Lonsinger conceded that in this case, "You say you [MEMIC] didn't get it..... I don't know. Obviously the staff didn't follow up on the tickle system to make sure that you did your job. I don't know."

But it was the Ford Agency's "job." MEMIC concedes that it failed to return calls after the premium dispute arose, and failed to ensure that the collection agency returned calls once MEMIC had delegated the matter to a collection agency. MEMIC has apologized for the poor service, but adds, correctly, that what it did wrong after the policy had already expired cannot be the cause of what went wrong during the policy period. It is true that during the policy period, once the Ford Agency abandoned the request for exclusionary endorsements, someone at MEMIC might have noticed the omission, after having flagged the file as potentially incomplete, and had the presence of mind to ask one last time, perhaps the following month, whether Terravecchia Building really intended to buy coverage for its owners as the policy indicated. That level of customer service would have rescued the Ford Agency from the consequences of its own negligence, but would have been above and beyond the call of duty. It was the Ford Agency that sent MEMIC the defective waivers the first time, it was the Ford Agency that never followed up after MEMIC warned that the waivers were defective, and it is the Ford Agency that is therefore responsible for making its customers whole. However, in the circumstances of this case, it should be MEMIC's responsibility, not Terravecchia Building's, to collect the sums due from the Ford Agency.

### ***Order and Notice of Appeal Rights***

It is therefore *ORDERED*:

1. The Petition is *GRANTED IN PART*, to the extent that the Petitioner shall be held harmless by both Respondents for all premiums on the subject policies in excess of the amount for which they would have been liable if coverage for the owners had been excluded for the entire policy periods; and *DENIED IN PART*, to the extent that the contract shall not be reformed to exclude coverage for the owners

before August 5, 2003, and MEMIC shall be entitled to collect premium for such coverage in the manner authorized below.

2. Within 60 days after the issuance of this Order, unless the deadline is extended by mutual agreement or upon motion for good cause shown, the Ford Agency, Inc. shall make restitution to MEMIC, pursuant to 24-A M.R.S.A. § 12-A, in an amount equal to the difference between the premium as actually earned by MEMIC for the period of coverage between April 20, 2002 and August 5, 2003 and the premium for which the Petitioner is liable pursuant to Paragraph 1 above.
3. The restitution ordered pursuant to Paragraph 2 above shall be MEMIC's sole recourse for collecting premiums for coverage for the Petitioner's owners. To the extent that MEMIC has already collected such premiums, MEMIC shall credit that amount immediately to the Petitioner's account, and shall issue a prompt refund if the premium credit materially exceeds the maximum deposit premium authorized by law.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 (2000) and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before August 9, 2004. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

**PER ORDER OF THE SUPERINTENDENT OF INSURANCE**

**JUNE 29, 2004**

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**ROBERT ALAN WAKE**  
**DESIGNATED HEARING OFFICER**

<sup>1</sup> Pursuant to 24-A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance Attorney Robert Alan Wake to serve as hearing officer, with full decisionmaking authority.

<sup>2</sup> It is not clear from the record when the 2003-04 policy was issued. It appears that there was a lapse in coverage during a period of time in which Terravecchia Building had no Maine operations.

<sup>3</sup> The version from one of the two MEMIC exhibits was highlighted by MEMIC to emphasize the missing stock ownership information. The version of the Ford Agency exhibit includes a fax header corroborating that it had been faxed to the Ford Agency by Dun & Bradstreet. There are also variations in copy quality and centering.

<sup>4</sup> MEMIC introduced two exhibits containing this version of the form. Mr. Reynolds testified that according to MEMIC's records, MEMIC Exhibit 1 appeared to be the application as mailed by the Ford Agency on April 19

and MEMIC Exhibit 3 was the request for additional information as sent to the Ford Agency on April 30.

<sup>5</sup> Or substantially similar completed waiver forms. Ironically, as discussed below, it was MEMIC and not the Ford Agency, that offered these copies into evidence. However, the forms introduced into evidence by MEMIC are consistent with Mr. Lonsinger's descriptions of the forms the Ford Agency claims to have faxed to MEMIC.

<sup>6</sup> By "match," I mean they appear to descend from the same originals. The discrepancies, apart from the routine vagaries of copying, are: MEMIC highlighted both exhibits after the fact, one page of Exhibit 4 bears a February 2004 Bureau of Insurance fax header, and Exhibit 4 lacks the May 17 fax headers found on Exhibit 5 (consistent with MEMIC's claim that Exhibit 5 was provided by the recipient and Exhibit 4 was provided by the sender).

<sup>7</sup> The situation is confused slightly because Mr. Lonsinger testified to filling in "The percentages of, or the number of shares of stock" as "50-50" after MEMIC warned him to have his clients fill in "numbers, not percentages." However, it is undisputed that the number of shares was still completely blank the first and only time MEMIC sent back the waiver forms for correction. Furthermore, there would have been even less motive for MEMIC to erase the figures "100" and "50" if those figures had been the reason for MEMIC's question. The most straightforward explanation is that MEMIC provided an advance warning because it is a common error, and that Terravecchia Building did, as stated, issue exactly 100 shares of stock.

<sup>8</sup> I take official notice that April 19, 2002 was a Friday.