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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVE MUNN et al.,

Plaintiffs and Appellants,

v.

EASTWOOD INSURANCE SERVICES,
INC.,

Defendant and Respondent.

G042594

(Super. Ct. No. 06CC00110)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Arthur D. Levy and Norman M. Goldman for Plaintiffs and Appellants.

Rutan & Tucker, Milford W. Dahl, Jr., and Zack Broslavsky for Defendant and Respondent.

Dave and Jeri Munn (the Munns) were the class representatives in a certified class action brought against Eastwood Insurance Services, Inc. (Eastwood) alleging violations of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.). Eastwood, a licensed insurance broker, obtained automobile insurance coverage for the Munns (and other class members) from Infinity Insurance Company (Infinity). It charged the Munns a \$125 broker fee for its services. The Munns alleged Eastwood was not acting as an insurance broker but as a de facto insurance agent for Infinity, making collection of a broker fee an illegal unapproved additional premium. The trial court, applying a “totality of the circumstances test,” concluded there was no material issue of fact as to Eastwood’s status as a broker, not a de facto agent, and it granted Eastwood’s motion for summary judgment. We agree with its conclusions and affirm the judgment.

APPLICABLE LAW (REGULATORY CONTEXT)

“[Automobile i]nsurance companies generally transact business through agents and/or brokers.” (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2010) ¶ 2:1, p. 2-1.) As relevant to the issue in this case, the latter may generally charge brokerage fees to an applicant for insurance in addition to the insurance premiums, without running afoul of Proposition 103’s restrictions on automobile insurance premium rates and its requirements that such rates be reviewed and approved by the California Department of Insurance (CDI). (Ins. Code, § 1861.01, et seq., enacted by the voters in Nov. 1988;¹ Croskey, *supra*, ¶ 2:9, p. 2-5; *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 934 (*Krumme*) [“only bona fide brokers may recover such fees, not persons claiming to be brokers who are in reality insurer’s agents”].) At issue in this case is whether Eastwood, in placing the Munns (and other class members) with Infinity for automobile insurance coverage, was acting as an insurance agent on behalf of the insurer or insurance broker. Accordingly, prior to

¹ All further statutory references are to the Insurance Code, unless otherwise indicated.

discussing the facts of this particular case, we find it useful to begin by discussing the fundamental distinctions between the two.

An “[i]nsurance agent” is “a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance.” (§ 31; see also § 1621 [“insurance agent” is a “person who transacts insurance . . . on behalf of an admitted insurance company”].) An “insurance broker” is “a person who, for compensation and on behalf of another person, transacts insurance other than life with, but not on behalf of, an insurer.” (§ 33; see also § 1623 [“insurance broker” is a “person who, for compensation and on behalf of another person, transacts insurance . . . with, but not on behalf of, an admitted insurer”].)

In short, “An insurance agent’s primary obligation is to represent the insurer in the transaction of insurance with the general public and to bind the insurer on coverage” (Croskey, *supra*, [¶] 2:4; p. 2-2.) An insurance broker, by contrast, acts on behalf of the insured. “Put quite simply, insurance brokers, with no binding authority, are not agents of insurance companies, but are rather independent contractors.” (*Marsh & McLennan of Cal., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118 (*Marsh*)). A broker’s “function is to represent proposed insureds in negotiating with insurance companies on rates, premiums and terms of coverage. A broker may deal with one or more separate insurance companies. [Citation.] [¶] Thus, in securing a policy for a client, a broker acts only on behalf of the client (the insured), not the insurer. [Citations.]” (Croskey, *supra*, [¶] 2:7; p. 2-5, italics omitted.)

Both insurance agents and insurance brokers must be licensed by the CDI (§ 1631), but a person may not act as an insurance agent without a notice of the agent’s appointment by the insurer to transact business on its behalf filed with the CDI. (§ 1704, subd. (a); *Loehr v. Great Republic Ins. Co.* (1990) 226 Cal.App.3d 727, 732-733 (*Loehr*)). Insurance brokers are subject to bonding requirements because unlike an appointed agent, a broker does not have the insurer available as a source of compensation

for aggrieved insureds. (See §§ 1662–1665; *Krumme, supra*, 123 Cal.App.4th at p. 929; *Croskey, supra*, [¶] 2:26.1; p. 2-11.)

FACTS & PROCEDURE

The Complaint

The Munns filed this class action against Eastwood and Infinity in 2005 alleging a single cause of action for violation of the UCL. The Munns alleged they purchased an Infinity automobile insurance policy through Eastwood in 2003 and paid a \$125 broker fee to Eastwood for its services. They alleged that since 2001, Eastwood had been holding itself out to the general public as an insurance broker, selling insurance and charging broker fees, when it was in reality a de facto insurance agent acting on behalf of Infinity. The Munns alleged a class that included all persons who purchased an Infinity automobile insurance policy through Eastwood from November 18, 2001, until the date of final judgment and who were charged a broker fee. They sought restitution of all broker fees Eastwood received during the class period, and an injunction prohibiting Eastwood from selling Infinity policies until it filed with the CDI a notice of appointment as an insurance agent and stopping it from charging broker fees on sales of Infinity policies.

In August 2007, the Munns obtained class certification. Eastwood filed a cross-complaint against Infinity for indemnification. In December 2007, Eastwood advised the court it had sold all its assets and business and as of May 6, 2007, it had ceased all insurance production business. In February 2008, the Munns and Infinity stipulated to Infinity's dismissal from the complaint over Eastwood's objections. The trial court denied Infinity's motion to compel arbitration, and while Infinity's appeal of that ruling was pending, Infinity and Eastwood stipulated to dismiss that appeal and dismiss the underlying cross-complaint without prejudice.

Eastwood's Summary Judgment Motion

Eastwood's summary judgment motion asserted the undisputed facts demonstrated it was a broker representing the Munns in obtaining insurance from Infinity. Its motion set forth the following facts.

In August 2003, the Munns contacted Eastwood to obtain automobile insurance. They needed to buy insurance immediately because they had been driving without insurance, and they wanted the lowest price. The Munns's lapse in coverage made them an unacceptable risk to many insurers. Jeri Munn read and signed an appointment of insurance broker and broker fee agreement with Eastwood appointing Eastwood as her and her husband's insurance broker. The broker fee agreement contained the following statements: (1) Eastwood was an insurance broker, not an insurance company; (2) "Broker agrees to represent Client honestly and competently[;]" (3) "Client understands that no coverage exists until the application is accepted by the insurance companies written through broker[;]" and (4) Eastwood would charge the Munns a \$125 nonrefundable broker fee for its services. The broker fee agreement further stated Eastwood had explained to the Munns the meaning of the available type of coverage and policy limits, the scope and adequacy of the type of coverage and policy limits, and indicated Eastwood would run "motor vehicle report(s)" (apparently referring to reports on the Munns's driving records obtained through the California Department of Motor Vehicles (DMV)). Jeri Munn handwrote "I have read and I understand the above" on the bottom of the broker fee agreement and signed it. She also signed a broker fee disclosure form, a form approved by the CDI, acknowledging that Eastwood "represents you, the consumer, and is entitled to charge a broker fee . . .," and Eastwood "may receive a commission" from the insurance companies with which it placed the Munn's insurance. In her deposition, Jeri Munn admitted she had read and signed these documents. She admitted Eastwood never held itself out as representing Infinity or any other insurer. She believed Eastwood represented her and her husband.

Judi Partridge, Eastwood's founder, declared that since its founding (until sold in 2006), Eastwood was at all times licensed by the CDI as an insurance broker. Eastwood at all times maintained the bond required by law of all brokers and was never appointed as an insurance agent by any insurer. As of 2003, Eastwood had brokerage agreements with 20 to 30 insurers, including Infinity, which permitted Eastwood to place its customers' automobile insurance with those insurers. All the insurers with which Eastwood had a brokerage agreement served the "non-standard" market, i.e., drivers with bad driving records or similar issues making them unacceptable to many larger insurers. In 2005 and 2006, Infinity's share of Eastwood's business was around 15 percent; in prior years, Infinity's share ranged from two-to-10 percent.

Eastwood used the "FSC comparative rater," a third-party, web-based insurance rate quoting system to help its customers locate an insurer. Many insurance companies, including Infinity and all other insurance companies with whom Eastwood had a broker agreement, provided their basic underwriting rules and rate structures to the FSC system. Eastwood paid "tens of thousands of dollars per year" to access the FSC comparative rating system.

To use the FSC comparative rater, Eastwood would gather certain key information from its customer, including address, driving record, vehicle model, and requested coverage. It would enter the customer information into the FSC comparative rater. Based on the input customer information, the FSC comparative rater would identify insurers whose underwriting guidelines (as disclosed by the insurer to FSC) were compatible with the customer's answers, and rank those insurers by price. After an insurance carrier was selected, the customer information which had been input into the FSC comparative rater was carried over to an electronic version of the selected insurer's application form. Eastwood would then assist its customer in filling out and submitting the application to the selected insurer. It would also obtain the customer's driving record from DMV to help ensure the application was accurate, thus increasing the chances the

customer received the rate quoted by the comparative rater. The completed application was then electronically transmitted to the selected insurer by Eastwood.

After Jeri Munn provided Eastwood with required information, Eastwood faxed her an application to obtain insurance through Infinity. She completed the application and returned it to Eastwood. Eastwood submitted the application electronically to Infinity on the Munns's behalf. Infinity, through its computerized application system, ZAP APP, provisionally accepted the Munns's application and electronically issued a temporary binder number ("binder").² Several days later, Infinity's underwriting department investigated the accuracy of the Munns's application, a process that included running a comprehensive loss underwriting experience (CLUE) report and its own DMV report. After its investigation, Infinity accepted the Munns's application by issuing the policy and mailing it directly to the Munns. Had Infinity found discrepancies, it would have done one of the following: (1) rescinded the binder outright, or (2) rejected the application at the quoted rate, but offered coverage at a corrected rate consistent with the facts revealed by Infinity's underwriting investigation. The Munns have been happy with their Infinity insurance and have renewed their coverage with Infinity annually since 2003.

Eastwood and Infinity had a brokerage agreement concerning Eastwood's rights to place insurance with Infinity. The brokerage agreement provided Eastwood was a broker/independent contractor, and could not perform any act that would typically be performed by an agent or that would lead an applicant to believe it was an agent of the insurer. As a broker, Infinity granted Eastwood the authority to solicit and submit applications "and bind coverage pursuant to the provision below entitled 'Binding Authority.'" The "Binding Authority" section of the brokerage agreement stated, "[t]he

² "A binder is a contract of insurance that provides coverage pending the issuance of the insurance policy. [Citation.]" (*Chicago Title Insurance Company v. AMZ Insurance Services, Inc.* (2010) 188 Cal.App.4th 401, 406.)

Broker shall have the authority to issue binders in accordance with the provisions of the Company's Underwriting Manual." The "Binding Authority" section of the underwriting manual issued by Infinity to Eastwood expressly provided: "You have no binding authority." The underwriting manual instructed a policy number was to be obtained on all new applications from Infinity's "automated telephone binding hotline, unless the applications had "been successfully uploaded using Infinity's One-Link Upload System or ADR's ZAP APP." By contrast, Infinity's standard agreement with its appointed insurance agents provided an agent could place a risk (in accordance with Infinity's underwriting guidelines) provided it first obtained payment and signed applications, and gave agents binding authority provided the "policies are received by [Infinity]" within certain time limits.

The rules regarding the risks Infinity would accept were set solely by Infinity and were built into both the FSC comparative rater and Infinity's ZAP APP system for processing applications. Coverage would not be bound until a binder number was issued by Infinity's computer system. Eastwood had no authority or mechanism for issuing binder numbers on its own. If a customer failed to fully complete the application, or answers did not comport with Infinity's underwriting rules, the computerized application system would not issue a binder number. If Infinity rejected coverage, Eastwood would then try to place the customer with another carrier.

The brokerage agreement imposed various other obligations on Eastwood including: adhering to state laws; maintaining its own errors and omissions insurance; remitting payments and documents in accordance with Infinity's underwriting guidelines, immediately reporting any claims of which it became aware; making its records available for inspection; providing information regarding applicants and insureds; complying with all of Infinity's underwriting guidelines and cooperating in investigation of any claims. The brokerage agreement provided it could be terminated at any time by either party with or without cause. It also contained a mutual hold harmless provision by which Eastwood

and Infinity each would hold harmless and indemnify the other for liabilities that resulted from the other's acts in violation of the brokerage agreement. If Eastwood made a mistake that led to a customer having no coverage for an accident, Eastwood would pay such claims itself. By contrast, Infinity's standard agent agreement provided Infinity would indemnify and hold harmless an agent for certain acts of the agent in placing insurance with Infinity.

Eastwood did not have access to the CLUE report obtained by Infinity when it investigated an application. It had no authority to alter the terms of coverage or offer any variants of Infinity's policies, other than as offered by Infinity. Eastwood did not have the right to, nor did it, use sub-brokers for Infinity business. Eastwood did not attend Infinity corporate events, obtain leads from Infinity, or participate in Infinity's cooperative advertising program. Eastwood advertised extensively, but it never promoted or mentioned Infinity or any other insurer in its ads. Eastwood did not display Infinity logos or signage in its offices or elsewhere. Infinity had only 50 to 60 appointed agents in California, but thousands of licensed insurance brokers in California were authorized to place insurance with Infinity.

Infinity never disciplined Eastwood personnel, never audited Eastwood, never came to Eastwood's offices to review files, or asked for financial statements from Eastwood. Although Eastwood would sometimes transmit a customer's down payment to Infinity, the insured had to send their monthly or periodic premium payments directly to Infinity.

The Munns's Opposition

In their opposition to Eastwood's summary judgment motion, the Munns largely relied on the documents submitted by Eastwood, such as the brokerage agreement, the agency agreement, and the underwriting manual, pointing out Infinity agents and brokers used the same applications, both were required to comply with the same set of underwriting guidelines. Agents, like brokers, transmitted almost all their

automobile insurance applications electronically using the same computer system—“manually bound applications are rare.” Brokers and agents needing help with applications and underwriting were given the same “800” telephone number to call and calls were handled the same way.

The Munns contended Eastwood was not simply submitting applications but was actually underwriting and binding insurance on Infinity’s behalf. Eastwood’s sales agents were trained on Infinity’s underwriting rules. Eastwood and Infinity had regular communication about underwriting issues and compliance with Infinity’s underwriting rules.

Eastwood sales agents using the ZAP APP system to fill out the Infinity electronic application, input the application information, and were able to upload the application to Infinity electronically. Infinity’s response would come within seconds. The ZAP APP system only scanned the application for the completeness of the information, calculated the premium, and then returned a copy of the application with a binder number on it. No person at Infinity evaluated the application prior to the computer system issuing the temporary binder number. Upon receipt of the binder number, the Eastwood sales agent could print out the application with the binder number and print out a temporary insurance identification card for the customer.

The Munns submitted a declaration from Deonne T. Burdusis, an independent insurance agent with over 35 years experience. He opined Eastwood served as an independent agent when placing insurance with Infinity. Burdusis believed Eastwood engaged in field underwriting and bound coverage on Infinity’s behalf at the point of sale because Infinity relied on Eastwood to compile, evaluate, and classify the customer’s information so he or she could obtain coverage—which were traditional underwriting and binding functions performed by appointed agents. Eastwood’s electronic process for rating and submitting applications to Infinity was functionally

indistinguishable from the process used by Burdusis's independent insurance agency's electronic process for rating and submitting applications.

The Munns also submitted a declaration from Stephen J. Fifield, another independent insurance producer experienced with the FSC comparative rater. He explained the FSC comparative rater is not underwriting software, it only computes rates for different insurance programs based on the information submitted. It takes professional skill and judgment on the part of a licensed agent to elicit the proper information to complete the FSC rating and the company application process.

The Munns also presented evidence Infinity treats its brokers and appointed agents similarly. Both apply for Infinity's approval to sell its policies using the same broker/agent application form and both must sign producer contracts. The broker/agent application form required Eastwood to provide a list of its other "carrier appointments," dates appointed, premium volume, and loss ratio experience, as well as to submit its loss ratio reports from other companies. Eastwood, like Infinity agents, received commission compensation from Infinity. During the five and one-half year period from late 2001 through early 2007, Eastwood generated \$95 million in premiums for Infinity, and Infinity paid Eastwood \$12,494,901.12 in commissions, an average of about 13% of premium.

Fifield explained, "A producer's loss ratio for a particular insurance company is the percentage of each premium dollar that is paid out in claims. Loss ratio is a measure of the profitability of the producer's business for the insurer." Eastwood had to maintain its Infinity loss ratio in a "normal range" and received commission bonuses from Infinity when it had good loss ratios. Infinity also gave incentives to Eastwood to increase its submitted business in exchange for a commission rate increase. Infinity tracked brokers' loss ratios, including Eastwood's, and used it in evaluating broker performance. It also awarded contingent compensation to its appointed agents based on production volume and loss ratio.

Trial Court Ruling

The trial court granted Eastwood's motion for summary judgment. The essential issue was whether Eastwood was acting as an insurance agent (on behalf of Infinity) or an insurance broker (on behalf of the Munns) in the insurance transactions. The Munns "advanced little in the way of disputed facts," instead arguing the inferences to be drawn from the facts should be resolved by the trier of fact.

The trial court observed much of the legal argument involved the test for determining broker/agent question—the Munns advocated an "any act" test; Eastwood advocated a "totality of the circumstances" test. The trial court concluded under any proposed test, the only conclusion that could be drawn from the evidence was that Eastwood was acting as a broker and was entitled to charge the disputed fees. The evidence did not support a conclusion Eastwood was underwriting or binding policies for its customers. "Eastwood had regular access to a modern, electronic resource which enabled it to discern what coverage and rates from multiple carriers might best fit the needs of a given customer. Eastwood performed its services as a broker by mating the carrier and customer through the interface of the 'FSC comparative rater.' Carriers programmed the FSC system with their individual standards and requirements. A potential insured who met these guidelines could reasonably anticipate that it would be covered by such a carrier. Eastwood acted as the interface by transmitting to the FSC computer the information which it gleaned from its customer. FSC would, in turn, indicate the carrier's most likely response to such an application: accept or reject. This meant that Eastwood could anticipate coverage through communications with FSC and not an immediate personal contact with any underwriter. The plaintiffs view the impersonal nature of this initial contact as 'proof' that Eastwood is itself doing the underwriting and binding as an agent of the insurer. Not so. Even if a high percentage of these initial contacts through FSC ultimately resulted in the issuance of policies, that merely shows that both the carrier and Eastwood did their jobs well. Carriers supplied

FSC with accurate detailed requirements and standards that could be known to brokers. Brokers could then take care not to seek coverage from any given carrier for a customer that the broker well knew would not meet the published underwriting rules of that carrier. It is undisputed that each carrier using the FSC system retained - and exercised - the right to refuse coverage to any applicant initially given a green light by FSC. None of these underwriting or binding decisions was ever made by Eastwood. Tentative approval came from carriers through their electronic responder (the FSC system), and final approval was issued by carriers in the form of a policy. Eastwood never had the authority to countermand a carrier's FSC rating or to bind a policy that the [i]nsurer did not approve. . . . [¶] The inferences sought by the plaintiffs are eminently unreasonable. They fly in the face of common sense, statutory law and a substantial amount of largely undisputed evidence. No trier of fact could reasonably conclude that a company that bears virtually every indicia of an insurance broker is actually the antithesis thereof. No trier of fact could reasonably conclude that a company that later substantially changed its form of doing business to become an insurance agency had been an insurance agency all along. Plaintiffs have sought to interpret the evidence in this case, but the result is merely argument and disagreement. That does not require denial of this motion.”

DISCUSSION

Standard of Review

We review an order granting or denying summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)). A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 850.) If the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (§ 437c, subd.

(p)(2); *Aguilar*, 25 Cal.4th at p. 849.) In determining whether the parties have met their respective burdens, the court must “consider all of the evidence” and “‘all’ of the ‘inferences’ reasonably drawn therefrom,” and “must view such evidence [citation] and such inferences [citations] in the light most favorable to the opposing party.” (*Aguilar*, *supra*, 25 Cal.4th. at p. 843.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850, fn. omitted.)

No Material Issue of Fact

The Munns contend the trial court employed the wrong test for determining whether Eastwood was an insurance broker (entitled to charge a broker fee on top of premiums) or an insurance agent (not entitled to charge a broker fee). We disagree.

Whether an insurance salesperson (or “producer”) “is determined by what the parties do and say, not by the name they are called. [Citations.]” (*Maloney v. Rhode Island Ins. Co.* (1953) 115 Cal.App.2d 238, 245 (*Maloney*); *Croskey*, *supra*, [¶]2:12; p. 2-7.) Traditionally, the question of whether one is acting as an agent is determined by reference to *all* the facts and circumstances presented. (See *L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 306 [“totality of these circumstances leads to the inevitable conclusion [real estate salesperson] acted as agent for both [buyer and seller]”]; *Detroit Trust Co. v. Transcontinental Ins. Co. of New York* (1930) 105 Cal.App. 395, 399 [question of agency determined by reference to all the facts and circumstances].) The Munns argue a “one act” test applies in the present context—i.e., if an insurance producer acts on behalf of an insurer *in any way*, other than by collecting premiums and transmitting insurance documents, the producer must be deemed to be an agent of the insurer, requiring a notice of appointment be filed.

The Munns argue we must be guided by the statutes as they existed during the relevant class period (2001 through 2007, when Eastwood ceased doing business).

The 2000 version of section 1623 read, “An insurance broker is a person who, for compensation and on behalf of another person, transacts insurance other than life insurance with, but not on behalf of, an insurer. Every application for insurance submitted by an insurance broker to an insurer shall show that the person is acting as an insurance broker. If the application shows that the person is acting as an insurance broker and is licensed as an insurance broker in the state in which the application is submitted, it shall be presumed, for licensing purposes only, that the person is acting as an insurance broker.” (Stats. 2000, ch. 1074 (Assem. Bill No. 2639) § 1.)

The 1990 version of section 1732 provided, “A person licensed as a fire and casualty broker-agent acting as an insurance broker may act as an insurance agent in collecting and transmitting premium or return premium funds and delivering policies and other documents evidencing insurance.” (Stats 1990, ch. 1420 (Sen. Bill No. 2642), § 57.) Section 1732 was originally enacted as section 1660.5 in 1953, following the decision in *Maloney, supra*, 115 Cal.App.2d 238. (Governor’s Office Legislative Memorandum on Assembly Bill No. 1417 (1953 Reg. Sess.) July 6, 1953.) In that case, a licensed insurance broker obtained an insurance policy for the insured and received the full premium payment from the insured. (*Maloney, supra*, 115 Cal.App.2d at p. 244.) The carrier then became insolvent and at issue was whether the broker held the premiums as agent for the insurer or the insured—if the former, then the premiums would have to be turned over to the insurer’s conservator. The *Maloney* court observed the dual agency of the broker. In procuring the policy, the broker acted as agent for the insured. (*Ibid.*) “But when the policy was delivered to the broker by [the insurer] for delivery to the [insured], and when the [insured] delivered to the broker the premium to be delivered to [the insurer], the broker became agent for the insurer to deliver the policy and to collect the premium.” (*Ibid.*) Section 1732 allowed licensed insurance brokers to continue the “universal practice” of delivering policies and collecting premiums on the insurer’s

behalf, without having to be licensed as insurance agents.” (Governor’s Office Legislative Memorandum on Assembly Bill No. 1417 (1953 Reg. Sess.) July 6, 1953.)

The Munns argue it is apparent when the version of section 1623 in effect during the class period is read with section 1732, that a broker may only act on an insurer’s behalf with regard to collecting premiums and transmitting documents—any other act on the insurer’s behalf makes the broker a de facto insurance agent, requiring it be licensed as such and, thus, precluding it from charging a broker fee. We disagree.

The Munns rely on *Krumme, supra*, 123 Cal.App.4th 924. In that case, up until Proposition 103 became effective in 1989, the insurer only sold its policies in the state through 800 appointed agents. (*Id.* at p. 933.) Beginning in 1989, the insurer terminated 700 of the appointed agents and made them brokers, which allowed them to charge broker fees. The brokers continued to have the same authority to bind the insurer. They used the same forms and rating and underwriting guidelines, they were subject to the same training and supervision and advertised themselves as representing the insurer. In the UCL action filed against the insurer, the trial court determined the brokers were de facto agents, and thus the broker fees ran afoul of Proposition 103. (*Id.* at pp. 933-934.)

On appeal, the insurer did not challenge the trial court’s conclusion its brokers were de facto agents. (*Krumme, supra*, 123 Cal.App.4th at p. 928.) Instead, the insurer argued there was no longer a real distinction between agents and brokers, the Legislature had codified the dual agency nature of brokers and agents in section 1732, and thus the acts by the brokers that made them appear to be agents were entitled to “statutory safe harbor.” (*Krumme, supra*, 123 Cal.App.4th at pp. 931, 940.) The plaintiffs urged the court to adopt of a “bright-line test,” the “one act” test the Munns propose in this appeal to be the correct law: “‘if the licensee acts as an agent for the insurer *in any capacity*, except as expressly allowed by section 1732 [collecting premiums and transmitting policy documents], the licensee is an agent and must be appointed.’” (*Krumme, supra*, 123 Cal.App.4th at p. 941.) The court found the “one-act”

argument was not “completely persuasive” as it involved selective reading of the statutory language. But the court also rejected the insurer’s argument there was no longer a meaningful distinction between agents and brokers (i.e., no safe-harbor). (*Id.* at p. 941.) *Krumme* at no point adopted a new test for deciding whether the brokers were in fact agents, because that factual finding by the trial court was not at issue on appeal.

After *Krumme* was decided, the Legislature amended sections 1623 and 1732 in Assembly Bill No. 2536. As amended, section 1623³ provides a person is

³ As amended, section 1623 now provides in full: “(a) An insurance broker is a person who, for compensation and on behalf of another person, transacts insurance other than life insurance with, but not on behalf of, an admitted insurer. It shall be presumed that the person is acting as an insurance broker if the person is licensed to act as an insurance broker, maintains the bond required by this chapter, and discloses, in a written agreement signed by the consumer, all of the following: [¶] (1) That the person is transacting insurance on behalf of the consumer. [¶] (2) A description of the basic services the person will perform as a broker. [¶] (3) The amount of all broker fees being charged by the person. [¶] (4) If applicable, the fact that the person may be entitled to receive compensation from the insurer, directly or indirectly, for the consumer’s purchase of insurance as a consequence of the transaction. [¶] (b) If a transaction involves both a retail broker and a wholesale intermediary broker, the wholesale intermediary broker shall be deemed to have satisfied its disclosure obligations under this section if it provides written disclosure to the retail broker of the criteria set forth in paragraphs (2), (3), and (4) of subdivision (a). [¶] (c) The presumption of broker status is rebutted as to any transaction in the admitted market in which any of the following is present: [¶] (1) The licensee is appointed, pursuant to [s]ection 1704, as an agent of the insurer for the particular class or type of insurance being transacted. [¶] (2) The licensee has a written agreement with an insurer containing express terms that authorize the licensee to obligate the insurer without first obtaining notification from the insurer that the insurer has accepted, conditionally or unconditionally, the submitted risk. [¶] (3) The licensee is authorized, pursuant to a written agreement with an insurer, to appoint other licensees as agents of the insurer, pursuant to [s]ection 1704. [¶] (4) The licensee is authorized, pursuant to a written agreement with an insurer, to pay claims on behalf of the insurer. [¶] (d) In all other cases, the presumption of broker status is rebutted based on the totality of the circumstances indicating that the broker-agent is acting on behalf of the insurer. [¶] (e) For purposes of this section, ‘totality of the circumstances’ means evidence indicating whether a broker-agent was acting on behalf of the insurer or was acting on behalf of a third person. In determining the totality of circumstances, all relevant facts and circumstances shall be reviewed and the review is not limited to any particular fact or

presumed to be acting as an insurance broker if he is licensed as a broker, maintains the required bond, and discloses in a written agreement signed by the consumer that he: (1) is transacting insurance on the consumer's behalf; (2) describes the basic services to be performed; (3) discloses the amount of broker fees being charged; and (4) discloses he might also be compensated by the insurer (e.g., receive commissions). (§ 1623, subd. (a), amended by Stats. 2008, ch. 304 (Assem. Bill No. 2956 (2007-2008 Reg. Sess.) § 2.)

The presumption can be rebutted if the producer was actually appointed an agent of the insurer for the particular type of insurance being transacted, or if the producer has a written agreement giving him binding authority, allowing him to appoint others as sub-agents, or pay claims on behalf of the insurer. (§ 1623, subd. (c).) Section 1623, subdivision (d), provides that in "all other cases, the presumption of broker status is rebutted based on the totality of the circumstances indicating that the broker-agent is acting on behalf of the insurer." (§ 1623, subd. (e).)

The trial court here concluded there was no material issue of fact as to whether Eastwood met all the requirements to avail itself of the statutory presumption that it was acting as a broker. It was undisputed Eastwood was licensed as a broker and maintained the bonds required of a licensed broker. The Munns signed a written agreement with Eastwood (the broker fee agreement and the broker fee disclosure form), which appointed Eastwood as the Munns's broker and stated Eastwood was acting on their behalf; described the basic services to be performed by Eastwood; disclosed the \$125 broker fee; and disclosed Eastwood might also receive commissions from the

factors and this section does not require that any particular circumstance receive greater or lesser weight."

As amended, section 1732 now provides, "A person acting as an insurance broker may, on behalf of an insurance company, collect and transmit premium or return premium and deliver policies and other documents evidencing insurance. Performance of those functions shall not be construed for any purpose to mean that the person is an insurance agent."

insurer. (§ 1623, subd. (c).) There was no evidence that would have satisfied the statutory means for rebutting the presumption. The undisputed facts were Eastwood was never an appointed insurance agent for any carrier; there was no written agreement giving Eastwood authority to bind Infinity or allowing it to appoint sub-agents or pay claims on Infinity's behalf. (§ 1623, subd. (c).)

The Munns argue Eastwood may not avail itself of the statutory presumption set forth in the amended section 1623, subdivision (a), because statutes generally operate prospectively only. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475 (*McClung*).) They similarly assert section 1623, subdivision (c)'s decree that in other cases the broker/agent status question is to be resolved by reference to the totality of the circumstances is a departure from existing law, and therefore it too is inapplicable to the present case.

We need not decide if the statutory presumption applies because the trial court correctly decided that even absent the presumption, the status question is correctly decided by reference to the totality of the circumstances. As already noted, traditionally a finding of agency is determined by reference to all the surrounding circumstances and nothing in *Krumme* purported to adopt a different test. A report to the Assembly Committee on Insurance on AB 2956 explained the purpose of the bill was to clarify the law regarding whether an insurance producer was acting as a broker or agent, and to “codif[y] the totality of circumstances test that has long been the common law rule” (Assem. Com. on Insurance, Analysis of Assem. Bill No. 2956 (2007-2008 Reg. Sess.) p. 4.)⁴ (*McClung, supra*, 34 Cal.4th at p. 471 [“If the amendment merely clarified existing law, no question of retroactivity is presented”].)

⁴ On Eastwood's request, the report was the subject of judicial notice in the trial court and is thus part of the record on appeal. The Munns have filed a request that we take judicial notice of other documents from the legislative record concerning Assembly Bill No. 2956. Additionally they ask us to take judicial notice of the amicus brief filed by the CDI in the *Krumme* case, in which the CDI similarly advocated the

Having concluded the trial court correctly concluded the agent/broker status issue is resolved by reference to the totality of the circumstances, we turn to whether there is any triable issue of fact. The Munns primarily argue there were material issues of fact as to whether Eastwood was underwriting or binding insurance. There were not.

As the Munns point out, a hallmark of an insurance agent as opposed to a broker are licensure and notice of appointment as an agent and the power to bind the insurer. (*Marsh, supra*, 62 Cal.App.3d at pp. 118-119.) A broker with no binding authority generally acts as the agent of the insured, not the insurer. (*Rios v. Scottsdale Ins. Co.* (2004) 119 Cal.App.4th 1020, 1026 (*Rios*); *Marsh, supra*, 62 Cal.App.3d at p. 117; *Croskey, supra*, ¶ 2:8, p. 2-5.) “[T]he broker does not have authority to bind an insurer and . . . the insurance company must first execute the binder or policy; a broker does not execute a policy without a prior authorization from the insurer. In contrast, the agent is authorized to execute the binder himself.” [Citation.]” (*Krumme, supra*, 123 Cal.App.4th at p. 929, citing *Marsh, supra*, 62 Cal.App.3d at p. 118.)

The undisputed facts demonstrate Eastwood had no authority to bind Infinity to insurance contracts without Infinity’s authorization obtained via its computer application system. Eastwood had no express contractual authority to bind Infinity to any risk. Although as the Munns point out, the brokerage agreement between Eastwood and Infinity provided the “Broker shall have the authority to issue binders in accordance with the provisions of the Company’s Underwriting Manual[,]” the “Binding Authority” section of the manual expressly stated, “You have no binding authority.” Furthermore, Eastwood did not exercise de facto binding authority. It was undisputed that the rules concerning what risks Infinity would accept were set solely by Infinity. Those underwriting rules were put by Infinity into the FSC comparative rater and the electronic ZAP APP system it used to process applications. Eastwood had no authority to issue, and

court should apply a one-act test in deciding if the producer acted as a broker or agent. Eastwood has not opposed the request for judicial notice and accordingly it is granted.

there were no procedures by which it could issue, a binder on its own initiative.

Temporary coverage was not bound until a binder number was issued by Infinity via its automated system in response to an electronic submission of the application. An actual insurance policy was not issued until Infinity's underwriting department then manually investigated the accuracy of the application, evaluated the acceptability of the risk, and determined whether to issue a policy or reject coverage.

The brokerage fee agreement between Eastwood and the Munns expressly stated "no coverage exists until the application is accepted by the insurance companies written through BROKER[,]'" thus advising the Munns Eastwood could not bind Infinity—rather it could submit their application to Infinity and get its approval to temporarily bind the risk. The focus of the Munns's argument is the rapid automated nature of the application/binding process. Eastwood electronically transmitted an application to Infinity and if the application met the parameters set by Infinity in its application program, Infinity temporarily accepted the risk (i.e., issued a temporary binder number), subject to further review by its own underwriting department. If the application was not accurately completed, or responses did not align with what Infinity required in its computer program for acceptable risks, the system would not issue the temporary binder number (i.e., the application would be rejected). But as Eastwood points out, the correct inquiry is not about speed or automation of the binding decision, but rather "“who made the decision to bind coverage?”" That Infinity's binding process was automated does not render the decision to accept the risk any less Infinity's own.

The Munns's declarations from Burdusis and Fifield do not establish a triable issue. They offer no additional or different facts bearing on the binding question but simply offer different opinions as to the legal effect of the facts. Both essentially opined Eastwood was binding coverage because the process for submitting applications was basically the same as the process they followed as a licensed agent. But that says nothing as to who the decision maker is.

The Munns also argue there were triable issues as to whether Eastwood was engaged in “field” underwriting on Infinity’s behalf when it submitted applications. We disagree.

““Underwriting” is a label commonly applied to the process, fundamental to the concept of insurance, of deciding which risks to insure and which to reject in order to spread losses over risks in an economically feasible way.’ [Citation.]” (*Hailey v. California Physicians’ Service* (2007) 158 Cal.App.4th 452, 465.) The Munns contend a trier of fact could conclude the following facts demonstrated Eastwood made the decision on who Infinity would and would not insure (at least on a temporary basis by issuing a binder): (1) Eastwood obtained and compiled information from the customer and organized and input that information into Infinity’s application form; (2) Eastwood checked at least some of the information for accuracy—specifically, it ran a DMV report to make sure the customer’s driving record was accurately stated; and (3) Eastwood applied Infinity’s underwriting rules and regulations “making sure that the final application was to Infinity’s standard” and made the decision to transmit the application (i.e., hit “send”).

We do not believe the facts demonstrate Eastwood was making underwriting decisions on Infinity’s behalf. Competently completing an application, and taking steps to verify some of the information included thereon, are nothing more than reasonable steps to ensure the customer had the best shot at obtaining coverage—that is after all exactly what Eastwood was retained by the Munns to do. And following Infinity’s own rules regarding risks it would cover (i.e., following Infinity’s underwriting guidelines) was a requirement of Eastwood’s broker agreement with Infinity and underscores that Infinity set the parameters for acceptable risks.

Having concluded there were no material issues as to whether Eastwood had authority to bind Infinity or was engaged in underwriting activities, we turn to other facts that might bear on the issue of its status. As already noted, the current version of

section 1623, subdivision (a), creates a presumption a producer is acting as a broker for the insured if certain requisites are met, and subdivision (c), sets forth factors that will rebut the presumption. Even if the amended statute is not controlling, it can provide guidance in assessing the facts as part of the totality of the circumstances.

As noted by the trial court, the Munns did not really dispute Eastwood met all the requisites for application of the statutory presumption: it was licensed as a broker; it maintained requisite bonds; and written agreements between the Munns and Eastwood appointed Eastwood as broker, described basic services to be performed, disclosed the \$125 broker fee, and disclosed Eastwood could receive commissions. And the Munns presented no evidence that would have automatically rebutted the presumption: Eastwood was never an appointed insurance agent for any carrier; and there was no written agreement giving Eastwood authority to bind Infinity, allowing it to appoint sub-agents, or to pay claims on Infinity's behalf.

None of the other surrounding circumstances create a material issue as to Eastwood's broker status. The other uncontroverted evidence in this case included that the parties contemplated Eastwood was the Munns's broker, not Infinity's agent. Eastwood's contract with Infinity, the broker agreement, specifically provided Eastwood was not an agent of Infinity. By contrast, Infinity's contracts with its appointed agents contained no similar language. The agreements between Eastwood and the Munns stated Eastwood represented the Munns. Jeri Munns admitted she believed Eastwood represented her and her husband. Eastwood at no time held itself out as representing Infinity, it did not reference Infinity in any of its advertisement, and it did not display Infinity logos in its offices. Eastwood had no authority to alter the terms of Infinity's offered policies, pay claims on Infinity's behalf, assign its rights, delegate its duties, or appoint any sub-brokers. (See *Rios, supra*, 119 Cal.App.4th at pp. 1026, 1029 [insurance producer not insurer's agent where contract between insurer and producer provided producer was not agent of insurer, had no authority to bind insurer, and no authority to

change the terms and conditions of policy]; *Loehr v. Great Republic Ins. Co.* (1990) 226 Cal.App.3d 727, 733 [written agency agreement is evidence that producer was the agent of the insurer].)

Although Infinity provided cooperative advertising opportunities for its appointed agents in California, and provided agents with sales leads, Eastwood generated all its own leads and conducted all its own advertising. Eastwood maintained its own errors and omissions insurance. Infinity was not bound to defend or indemnify Eastwood for Eastwood's negligence, whereas it did indemnify its agents for certain actions taken on Infinity's behalf. Other than sometimes transmitting a customer's down payment, Eastwood otherwise did not accept premium payments on Infinity's behalf, or deliver policies to customers.

The Munns assert Eastwood was subject to Infinity's control, suggesting it was Infinity's agent. They point to evidence Eastwood was required to comply with Infinity's underwriting guidelines, trained its salespersons on the requirements of Infinity's underwriting manual, and Infinity provided extensive underwriting guidance and support. But all this simply reinforces that it was Infinity that made decisions on what risks to bind, not Eastwood. The Munns also point out that Infinity's appointed agents basically followed the same binding procedures in placing Infinity insurance—they too used the FSC comparative rater to obtain quotes, and the ZAP APP system to submit applications—and agents rarely manually bound insurance. But evidence that appointed agent did not act like agents, is not evidence brokers were agents. Finally, the Munns argue Infinity's strict monitoring of the loss ratio of its brokers demonstrates Eastwood was making underwriting and binding decisions, i.e., Eastwood made decisions on what applicants were good risks and did not submit applications on behalf of applicants who might be high risk. Again, that fact does not support a conclusion Eastwood was acting as Infinity's agent—only that Infinity was particular about what brokers it wanted selling its products.

In summary, we agree with the trial court that under the totality of the circumstances, no trier of fact could infer from the evidence that Eastwood was a de facto agent of Infinity in preparing and submitting the Munns's application for automobile insurance. Accordingly, the trial court properly granted Eastwood's motion for summary judgment.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

O'LEARY, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.