

1 SUPERIOR COURT OF CALIFORNIA  
2 COUNTY OF SAN FRANCISCO

**FILED**  
San Francisco County Superior Court

APR 18 2005

GORDON PARK-LI, Clerk  
BY: [Signature] Deputy Clerk

4 ROBERT KRUMME,

5 Plaintiff,

6 vs.

7 MERCURY INSURANCE COMPANY;  
8 MERCURY CASUALTY COMPANY; and  
9 CALIFORNIA AUTOMOBILE  
10 INSURANCE COMPANY,

11 Defendants.

) Case No.: 313367

) RULING ON DEFENDANT'S MOTION TO  
) VACATE PERMANENT INJUNCTION

11 This Court is asked to vacate the injunction it issued on May 13, 2003. This injunction  
12 was issued after substantial litigation by the parties that commenced when Plaintiff filed his  
13 complaint in 2000. At the time the injunction was issued, the Court agreed to stay this relief  
14 while Defendant appealed the ruling of the Court. The Defendant's appeal to the Court of Appeal  
15 was unsuccessful; that Court affirmed this Court's judgment on October 29, 2004. Thereafter,  
16 the Defendants sought review by the Supreme Court. On January 29, 2005, the Supreme Court  
17 denied review and also rejected the application by Defendants to depublished the opinion of the  
18 First District Court of Appeals. With this determination by the Supreme Court, the decision of  
19 this trial court became final.

20 Once the decision became final, the Defendants instituted certain changes in their  
21 marketing of insurance and relationship with brokers that they believed satisfied the complaints  
22 outlined by this Court in its Statement of Decision. These changes were made as Defendants  
23 petitioned this Court to vacate the permanent injunction it had imposed in the original judgment.  
24 In other words, the decision became final, the Defendant then made certain changes in its policy  
25 towards broker-initiated transactions, and the Defendant simultaneously requested this Court to

1 vacate its injunction. Significantly, after the Plaintiff filed its opposition to the Motion to Vacate,  
2 Mercury made further corrections in its processing of broker-initiated insurance policies.

3 The issue for this Court is whether the changes are adequate to vacate the injunction.  
4 When making this determination, the Court must consider not only what has happened since the  
5 decision in this case became final, but also the record and evidence presented throughout the  
6 litigation of the matter. Contrary to Defendant's assertions at the hearing, it is not enough to say,  
7 "that was then and this is now".

8 This Court was previously presented with a significant record that allowed the Court to  
9 make a determination that Mercury Insurance Company was violating important principles  
10 mandated by the California Insurance Code. The Statement of Facts and Conclusions of Law in  
11 that Decision will not again be revisited here. It is enough to say that the Court spent  
12 considerable time before it reached the decision it did, and that the record more than supported  
13 the conclusions reached. Indeed the Court of Appeals noted that the findings were "extensive"  
14 and essentially "not challenged" by Mercury. *Krumme v. Mercury Insurance Company* (2004)  
15 123 Cal.App.4<sup>th</sup> 924, 946. The appellate court then concluded, "These undisputed findings are  
16 sufficient to establish that the brokers are the ostensible agents of Mercury, . . . and Mercury is  
17 therefore vicariously responsible for them. . . "Id. The court also concluded that the permanent  
18 injunction was appropriate relief based on the record and that there was "no abuse" in imposing  
19 this remedy based on the record in the case. *Id.*

20 Even after this Court's ruling and the subsequent affirmance by the Court of Appeals, the  
21 Defendant did not make the changes currently before the Court. Instead, pursuing its appellate  
22 option, the Defendant asked for review by the Supreme Court. That review was denied on  
23 January 19, 2005. Only after this pronouncement did the Defendant first present the changes  
24 reviewed by this Court at the hearings on the Motion to Vacate the Injunction.

1 Mercury has set the wheels of change in motion. Important changes have been made in  
2 the advertising of its product, especially with regards to the agent-broker distinction. The claim  
3 was made that Defendant has shifted from primarily a broker-based insurance force to one that is  
4 primarily agent-based. This reflects the status of Mercury before it began the practices that were  
5 addressed in this Court's original ruling. However, the Defendant continues to court brokers to  
6 sell its product, a practice this Court does not seek to discourage. Nevertheless, Plaintiff  
7 correctly identifies features of the broker-Mercury relationship that concern the Court.<sup>1</sup>

8 One of the cornerstones of change identified by Mercury in the hearing conducted on the  
9 Motion to Vacate was a program known as Quicksilver, used by Defendants to evaluate  
10 insurance policy applications submitted by both agents and brokers to Mercury. Quicksilver is a  
11 software program used to process any electronic request for insurance coverage offered by  
12 Mercury sponsored entities. During the hearing before this Court, it was presented as a key  
13 feature to prevent underwriting by brokers. Quicksilver was described as a software program  
14 that allows brokers to enter information regarding the potential insured. Once the information is  
15 entered, personnel at Mercury offices evaluate this information for approval. Only after Mercury  
16 underwriters made the approval did the consumer applicant become an insured of Defendant.

17 Agents of Mercury also use the same Quicksilver program when they submit applications  
18 for coverage. The separate manuals detailing the underwriting process and procedures of  
19 Quicksilver provided to the Mercury agents and to brokers "selected" by Mercury are essentially  
20 the same except for particular language identified in the beginning of the respective documents.  
21 It appears that the information entered in the software program is the same, whether placed by

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22  
23 <sup>1</sup> The relevance of Plaintiff's observation has some import. The Court notes  
24 that the Plaintiff's response to Defendant's Motion to Vacate triggered  
25 significant changes in Defendant's practices with the brokers, including the  
award of commissions. (Defendant's Reply to Support of Motion to Vacate,  
Declaration of Gabriel Tirador, dated March 16, 2005) Additionally, the  
Court has observed the advocacy of Plaintiff to be generally objective, not  
partisan, on the issues of this case.

1 the agent or a broker. A key distinction suggested by Defendants is that agents are able to “bind”  
2 an applicant at the end of the processing, but brokers must await the approval by the underwriters  
3 at Defendant’s business offices. Much of the evidence presented in the three days of hearing on  
4 Defendant’s Motion to Vacate focused on this program. It was identified as the process whereby  
5 the feature of ostensible agency, a critical part of this Court’s ruling, was being corrected. With  
6 Quicksilver in place, Defendant would correct the underwriting process and the legal issues  
7 present with ostensible agency.

8         Significantly, the Quicksilver software program has been in place at Mercury for the past  
9 five years according to the evidence presented at the hearing. Simply stated, it was the software  
10 used by both agents and brokers during a portion of the time the Court found Defendant in  
11 violation of legal distinctions between brokers and agents created by statute. It was introduced  
12 during the period Defendant was found engaging in the improper practices that triggered the  
13 issuance of the permanent injunction Mercury now seeks to vacate. One could conclude  
14 Quicksilver was designed not to correct the legal issue of ostensible agency but rather to  
15 facilitate its expansion electronically as a software program. Originally, Quicksilver was used to  
16 expedite the processing of applications at a time when Defendant was fully engaged in a practice  
17 of ostensible agency that this Court as well as the appellate courts found in violation of the  
18 Insurance Code. Importantly, nothing was presented to this Court to suggest that the Quicksilver  
19 program was modified to cure the practices precluded by the permanent injunction. Instead, the  
20 evidence in the record demonstrates that the software in place, and its operation, pre-injunction,  
21 is the same in place and in operation, post-injunction. Consequently, this Court cannot view  
22 Quicksilver with the degree of optimism suggested by Defendants.

23         Putting aside the Quicksilver program, the Court prefers to address the necessary changes  
24 that Mercury must undertake to divorce brokers from agents consistent with the dictates of the  
25 Insurance Code.

1 Mercury continues to exercise significant financial control over brokers identified with it.  
2 The Court found that Defendant's use of commissions and the rate of commissions focused on  
3 practices pertaining to effective underwriting by the brokers. Indeed, Irene Bass, a defense  
4 expert, described the current practices of information gathering by agents and brokers of  
5 Mercury as "front line underwriting." It was and apparently still is the practice to measure  
6 *broker* commissions by the effective discharge of this responsibility. The better practice  
7 regarding broker commissions should be to provide the same commission rates for all brokers.  
8 The amount of commission should reflect the broker's volume of sales, not the effectiveness of  
9 "front line underwriting" by her or him. The Court therefore directs that commissions any  
10 broker earns for connecting a customer with Defendant be based on the volume of business  
11 directed to Mercury, and not factors currently in place that emphasize the skills pertaining to  
12 processing information contained in broker manuals, and the appreciation of Mercury's  
13 underwriting guidelines by the broker.

14 Mercury also continues to exercise a high degree of control over those brokers allowed to  
15 market their product. This was among the facts identified by the Court in its ruling. This control  
16 by Defendant is rooted in an effort to limit the number of brokers accessible to Mercury products  
17 based on the broker relationship with Defendant, rather than consumer access. The applicant  
18 becomes secondary to the Defendant. There is no current practice of an open application  
19 procedure, something that would negate the past vestiges of ostensible agency that were  
20 observed in the Statement of Decision. To remove the taint of past practices, Defendant should  
21 adopt an open application procedure allowing any licensed broker, as well as Mercury agent, to  
22 submit insurance applications. Only those brokers engaged in acts of impropriety or dishonesty  
23 should be unable to submit insurance applications seeking Mercury coverage for consumers.

24 By continuing to recognize only a limited number of brokers to offer Mercury services,  
25 by providing a very detailed broker manual that details Defendant's underwriting practices, and

1 by training its accepted brokers in the particulars of the broker manual and its goals, Mercury  
2 continues to delegate underwriting and binding functions based on informed subjective  
3 judgments made by brokers. Based on historical practices familiar to this Court, it is too simple  
4 to suggest that the underwriters in Brea, California, Mercury's home office, are performing this  
5 function. Historical reality, the fact that Quicksilver was running in those prior times, and the  
6 attention focused by Defendant on current broker responsibility, cause this Court to have an  
7 honest skepticism change permeates Defendant's operation. Instead, if Defendant believes that  
8 manuals and instruction materials are necessary for any brokers vending Mercury products, then  
9 such materials provided *brokers* as opposed to agents, should be simplified in nature without  
10 articulating the numerous subjective factors Defendant relies upon in binding and underwriting.  
11 Such change allows the broker to serve the consumer or insured primarily, and places the  
12 underwriting function clearly in the hands of the Mercury staff. Industry standards and  
13 principles, not specifics in the Defendant's own literature, should dictate information transmitted  
14 by *brokers* to the insurer.

15 The Court also finds that Defendant continues to exercise substantial control over the  
16 brokers it approves to offer its insurance services. The evidence has established, and continues  
17 to demonstrate, that Defendant has the ability to advance threats of financial consequences such  
18 as reduced commissions and/or termination as a sanction for poor broker performance in "front  
19 line underwriting" and prevention of losses by Mercury. This can be corrected by obligating  
20 Defendant to publish written guidelines to its field personnel that specifically identifies the  
21 standards of broker performance and role, if any, that poor risk signups have on Mercury's  
22 assessment of that performance.

23 When this Court issued its original Statement of Decision, Defendant had a substantial  
24 number of brokers engaging in transactions that legally sufficed for them to be labeled "ostensible  
25 agents." At the hearing on the Motion to Vacate, the Defendants represented that most of the

1 producer force used by Mercury presently were agents, properly registered with the Department  
2 of Insurance as Mercury agents. To that large force doing business for Defendant, and not  
3 charging fees to California consumers, the permanent injunction is not an issue. However, to  
4 those sixty or so brokers, still in a relationship with Mercury, and currently opting not to become  
5 Mercury agents, the Court's concerns are still present. Practices currently in play by Defendant  
6 in this regard, while noted, are not adequate to vacate the injunction as requested. The ostensible  
7 agency feature of broker business with Defendant is still present and the Court has addressed the  
8 major additional changes that Mercury must undertake to satisfy this tribunal. Additionally, the  
9 Court does believe that some period of review should take place before one can note a true  
10 picture of the broker relationship with Mercury. The period of observation and scrutiny cannot  
11 be measured by a swift contention that all is better. Certainly, any further judicial review should  
12 be presented only after the parties have met and conferred and appropriate evidence reflecting  
13 the nature of the broker relationship with Defendant can be assessed. For now, the Court has  
14 presented additional changes Defendant must implement before any injunction is vacated.

15 The Court will modify its injunction consistent with the views expressed in this opinion.

16 The motion to vacate the injunction is denied.

17 DATE: April 18, 2005

18 

19 Judge of the Superior Court

Superior Court of California  
County of San Francisco

ROBERT KRUMME,

Plaintiff(s)

vs.

MERCURY INSURANCE COMPANY;  
MERCURY CASUALTY COMPANY; and  
CALIFORNIA AUTOMOBILE  
INSURANCE COMPANY,

Defendant(s)

Case Number: 313367

**CERTIFICATE OF SERVICE BY MAIL**  
(CCP 1013a (4) )

I, VERA MU, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On April 18, 2005 I served the attached RULING ON DEFENDANT'S MOTION TO VACATE PERMANENT INJUNCTION by placing a copy thereof in a sealed envelope, addressed as follows:

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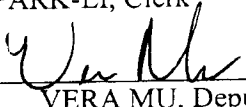
ROBERT J. CERNY, Esquire  
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and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: April 18, 2005

GORDON PARK-LI, Clerk

By: \_\_\_\_\_

  
VERA MU, Deputy Clerk

CERTIFICATE OF SERVICE BY MAIL.