TRIAGE, INC.	**:**	**COURT OF COMMON PLEAS**
	:	**PHILADELPHIA COUNTY**
vs.	**:**	**COMMERCE PROGRAM**
	:	
PRIME INSURANCE SYNDICATE, INC.	**:**	**NOVEMBER TERM, 2002**
et al.	**:**	**NO. 1570**

ORDER and MEMORANDUM

AND NOW, to wit, this 13th day of October 2004, upon consideration of the within matter presented to the Court as a case stated, and after reviewing the submissions of the parties, the Court finds in favor of Plaintiff, Triage, Inc., and against Defendant, Prime Insurance Syndicate, Inc., in the amount of $88,377.91, plus interest at the legal rate from October 13, 2001 to the present.

BY THE COURT:

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GENE D. COHEN, J.

TRIAGE, INC.	**:**	**COURT OF COMMON PLEAS**
	:	**PHILADELPHIA COUNTY**
vs.	**:**	**COMMERCE PROGRAM**
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PRIME INSURANCE SYNDICATE, INC.	**:**	**NOVEMBER TERM, 2002**
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MEMORANDUM

COHEN, GENE D., J.

The question before the Court is whether an insurance company which issues an insurance policy through a broker to an insured is liable for that portion of the premium that the broker retained after the insurance company cancels the policy.

FACTS:

This case came before the Court as a "case stated" subject to stipulations of agreed facts. It is agreed that the defendant, Prime Insurance Syndicate, Inc. ("Prime"), authorized United Risk Management to act as its broker in the sale of insurance to the plaintiff. The plaintiff is a Pennsylvania paratransit company. While Prime was not directly licensed to provide insurance in this Commonwealth, it was required to conduct business through a surplus lines broker, *viz*. United Risk Management. (*See* 40 P.S. §991.1601, *et seq.*). A surplus lines broker agreement entered into by United Risk and Prime authorized United Risk to collect all premiums and payments from the plaintiff. Indeed, United Risk collected a premium $121,169.00. This was the amount of premium that was due to be returned to the plaintiff on or about October 13, 2001, when Prime Insurance exercised its right to cancel the policies and policy endorsements earlier than the term. While Prime paid Triage $32,791.09 of the aforementioned total premium, it disputed its responsibility to pay the balance -- $88,377.91. The foregoing figure involves $31,967.29 which Prime made the subject of a counterclaim. (That counterclaim has been dismissed and is to be resolved by way of binding private arbitration; the Court will find in favor of plaintiff in the amount of $31,967.29.)

The heart of the matter concerns the $56,410.62 that United Risk never forwarded to Prime. The Court will enter judgment awarding Triage the total amount of $88,377.91, holding that payment of the portion of the premium that United Risk took constitutes payment to Prime.

DISCUSSION:

This is the unusual case in which a premium has been paid to a broker, a policy has been issued, but no underlying accident or catastrophe has occurred for which the insured seeks coverage. Instead, the question is whether an insurance company, having cancelled its policy early and duly returned that portion of the premium it had in hand, is also responsible for that portion of the premium that its broker kept. In order to resolve this question the Court looks to some rather ancient Pennsylvania law and finds that the weight of the law favors the insured in this matter.

In Gosch v. Fireman's Ins. Co., 33 Pa. Super. 496 (1907) – also decided on a case stated basis – the Superior Court of Pennsylvania holds that:

> Under the conditions now before us the law declares that the company may not be heard to allege non-payment of the premium to escape the greater obligation of indemnity, for the same reason must it turn a deaf ear to the same allegation, when advanced to escape the lesser obligation to return the unearned premium in case of cancellation. We are impelled, therefore, alike by reason and authority to hold that for all purposes of this case the premium on the policy of the plaintiffs was paid and the rights and obligations of the company under the cancellation clause quoted must be determined as if the money of the plaintiffs had been paid directly into the home office.

In Transcontinental Oil Co. v. Atlas Assurance Co., 123 A. 497 (Pa. 1924), the Court reaffirmed the holding in Gosch and stated that "When [the policy] was cancelled and surrendered the liability of the insurance company for the owner and premium became fixed." (citing Baldwin v. Pa. Fire Ins. Co., 55 A. 970 (Pa. 1903), and Chadborn v. German American Ins. Co., 31 F. 533 (Circuit Court S.D. N.Y. 1897).)

The Court agrees with the plaintiff when it characterizes the role of United Risk in this matter as a double agency. (*See* Rossi v. Fireman's Ins. Co., 165 A. 60 (Pa. 1932).) The case might

have been different had the broker been considered the agent of the insured rather than the agent of the insurer, but in this scenario in which there is really no difference among the parties as to the material facts, the broker was the agent for both parties and as such the party who was "paid" through the broker the uncollected premium must pay it back, reserving the right, of course, to proceed against United Risk. As the Supreme Court said in Transcontinental Oil Co., "Payment to insurer's agent, authorized or having apparent authority to receive the premium, is equivalent to payment to insurer; and the policy has its inception from the instant such payment is made. And it is no defense to the company that the agent has not remitted at all . . . if the insurer has entrusted the policy to its agent for delivery to the insured [the situation in this case] and the latter, in reliance thereon, has paid the premium to such agent [again, the situation in this case], the insurer cannot be heard to say that such agent has not authority to collect." (*See* Transcontinental Oil Co. at 123 A. 498-499.)

Accordingly, the Court will enter judgment for the plaintiff and against the defendant, Prime Insurance Company, in the sum of $88,377.91 – the amount of the premium that has not been repaid.

An appropriate order will issue.

BY THE COURT:

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GENE D. COHEN, J.