

## "Any One Act Test" Rejected by Court in Favor of "Totality of the Circumstances"

Posted on November 19, 2010 by [Barger & Wolen LLP](#)

In a non-published decision issued on November 18, 2010, the [California Court of Appeal](#) affirmed summary judgment against class-action lawyers seeking refunds on broker fees in [Munn v. Eastwood Insurance Services](#).

The decision rejected the argument that if a broker performs any act on behalf of the insurer, the broker is a de facto agent, and subjects the broker to a refund of all broker fees collected.

The court rejected the “any one act test” and followed the “totality of the circumstances test,” which has been advocated by this firm for several years as the appropriate test to distinguish the difference between an agent and broker.

The “totality of the circumstances test” was codified into law by legislation in 2008 ([AB 2956](#)) that Barger & Wolen Senior Regulatory Partner [Robert Hogeboom](#) helped draft.

The court’s decision upheld the [FSC comparative rater](#) and the electronic Zap App systems as the appropriate mechanisms for brokers to input information and process applications, and it rejected the plaintiffs’ claim that it was a process to encourage upfront underwriting and binding by the broker.

Finally, the court recognized that the recent amendment to [California Insurance Code section 1623](#), which includes the definition of “broker” and creates a presumption, did provide the court with “guidance in assessing the facts as part of the totality of the circumstances.”

Barger & Wolen’s [Robert Hogeboom](#) and [Suh Choi](#) served as special consultants on the broker fee issue to Eastwood’s counsel, [Milford Dahl](#) and [Zack Broslavsky](#) of [Rutan & Tucker](#), and to Judi Partridge, former owner of Eastwood.

If you have any questions, please contact Robert Hogeboom via [e-mail](#) or at (213) 614-7304.