

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

CUTTING EDGE SPORTS, INC., t/a	:	MARCH TERM, 2003
SOFTBALL AMERICA,	:	
	:	No. 01835
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 73062
BENE-Marc, INC.,	:	
	:	
Defendant,	:	
	:	
v.	:	
	:	
NORTH AMERICAN SPORTS FEDERATION,	:	
And NORTHLAND INSURANCE COMPANY,	:	
	:	
Additional Defendants.	:	

**ORDER AND OPINION**

**AND NOW**, this 28<sup>th</sup> day of September, 2004, upon consideration of defendant's Motion for Judgment on the Pleadings and/or Motion to Dismiss, plaintiff's response thereto, the briefs in support and opposition, the oral argument of counsel heard on September 20, 2004, and all other matters of record, and in accord with the Memorandum Opinion entered simultaneously herewith, it is hereby **ORDERED** that said Motion is **DENIED**.

**BY THE COURT,**

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**GENE D. COHEN, J.**

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SOFTBALL AMERICA,	:	
	:	No. 01835
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
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BENE-MARC, INC.,	:	
	:	
Defendant,	:	
	:	
v.	:	
	:	
NORTH AMERICAN SPORTS FEDERATION,	:	
And NORTHLAND INSURANCE COMPANY,	:	
	:	
Additional Defendants.	:	

**MEMORANDUM OPINION**

Plaintiff is an entity that organizes and runs amateur adult softball leagues, and, as such, Plaintiff is a member of additional defendant North American Sports Federation (“NASF”). Defendant Bene-Marc, Inc. (“Bene-Marc”) is an insurance broker that obtained policies of liability insurance and excess accident medical insurance for NASF and its members for the years 2001 and 2002.<sup>1</sup>

Plaintiff alleges that in 2002 it received a brochure from Bene-Marc in which Bene-Marc offered to procure insurance coverage for Plaintiff upon Plaintiff’s completion of an enrollment form and payment of a set amount to Bene-Marc (the “2002 Brochure”). The 2002 Brochure stated that

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<sup>1</sup> Additional defendant, Northland Insurance Company (“Northland”) issued the liability policy to NASF in 2002.

the NASF \$2,000,000 liability insurance policy protects each team on an occurrence basis. Coverage is provided for lawsuits brought as a result of bodily injury and property damage, as well as participant claims arising from the amateur sports activities of your team.

First Amended Class Action Complaint (“Complaint”), Ex. A.

In 2002, a participant in one of Plaintiff’s softball games injured his ankle, and Plaintiff submitted a claim for coverage to the liability insurer, Northland. Northland denied the claim on the basis that the liability policy it issued to NASF and its members did not include coverage for participant claims. As a result, Plaintiff brought this suit on behalf of itself and all other entities similarly situated that purchased liability insurance based on the 2002 Brochure.<sup>2</sup> In its Complaint, Plaintiff alleges that Bene-Marc breached its contract with Plaintiff to procure liability insurance with participant coverage and that Bene-Marc was unjustly enriched thereby. Bene-Marc has moved for judgment on the pleadings and/or to dismiss both claims.

**I. Bene-Marc’s Request to Dismiss Plaintiff’s Breach of Contract Claim Must Be Denied.**

Bene-Marc argues that the breach of contract claim should be dismissed because Bene-Marc never entered into a contract with Plaintiff. In Bene-Marc’s view, the 2002 Brochure is a mere advertisement and not an offer to form a contract. The court may determine, as a matter of law, whether the brochure constitutes an offer or an advertisement. *See Bourke v. Kazaras*, 746 A.2d 642, 645 (Pa. Super. 2000). A writing is an offer rather than a mere advertisement if it contains “some language of commitment or some invitation to take action without further communication.” *Id.*

In this case, the 2002 Brochure permits NASF members to “enroll” in the proffered insurance program by filling out an enrollment form and sending it along with a check to Bene-

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<sup>2</sup> In its Motion for Class Certification, Plaintiff makes clear that it is also asserting claims based on a 2001 Brochure. Since the claims involving the 2001 Brochure are very similar to those involving the 2002 Brochure, the court’s resolution of the issues raised in this Motion for Judgment on the Pleadings applies to the all Plaintiff’s claims.

Marc. *See* Complaint, Ex. A. The clear implication of the 2002 Brochure's language is that, once an NASF member takes this specified action, it has obtained the proffered insurance; there is no need for the parties to take further action or engage in further negotiation. Therefore, the 2002 Brochure constitutes an offer that was accepted by Plaintiff when it complied with the offer's terms.

Bene-Marc also questions with whom Plaintiff entered into the contract, Bene-Marc, NASF, or Northland. Bene-Marc argues that it is not an insurer and could not issue insurance, so that, if the 2002 Brochure is an offer of insurance, it must be viewed as an offer from Northland, the insurer that issued the 2002 liability policy. However, the offer contained in the 2002 Brochure is an offer to obtain specified insurance coverage, not to issue a policy. As an insurance agent, Bene-Marc was certainly in a position to offer to procure insurance, so the 2002 Brochure could be read as an offer to do so by Bene-Marc.

Bene-Marc next claims that NASF prepared and distributed the brochure and therefore that the brochure constitutes an offer by NASF, not Bene-Marc, to procure insurance for its members. However, the brochure directs NASF members to send their enrollment forms, and make out their checks, to Bene-Marc, and Bene-Marc apparently accepted such forms and payment from, and sent a certificate of insurance to, Plaintiff. Therefore, it is a question of fact whether the offer and the resulting contract was between NASF and Plaintiff or Bene-Marc and Plaintiff.

## **II. Bene-Marc's Request to Dismiss Plaintiff's Unjust Enrichment Claim Must Be Denied.**

Bene-Marc asks the court to dismiss Plaintiff's claim against Bene-Marc for unjust enrichment because Plaintiff got what it paid for, i.e. the premium it paid was for liability insurance without participant coverage, and Bene-Marc's commission was based on that

premium and not the, presumably higher, one for liability insurance with participant coverage. However, the issue of whether Bene-Marc was unjustly enriched cannot be decided on the basis of the pleadings alone. Instead, the parties must submit evidence as to whether Bene-Marc received more in premiums and commissions than it should have for less insurance than it promised to obtain, i.e., whether Bene-Marc would have been entitled to more, less, or the same amount if it had procured the promised liability insurance with participant coverage for Plaintiff.

### **CONCLUSION**

For all the foregoing reasons, defendant's Motion for Judgment on the Pleadings and/or Motion to Dismiss is denied.

**BY THE COURT,**

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**GENE D. COHEN, J.**