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A Special Report Reviewing Trends in Insurance Agents' and Brokers' Errors
and Omissions Liability Prepared by the Law Firm of Lustig & Brown, LLP

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New York's Anti-Rebate Law Has Serious Implications for Agents, Brokers

Quite often, New York Insurance agents and brokers contact us to discuss whether certain actions they are considering constitute rebating under New York law. While rebates in many consumer transactions are viewed favorably, such is not the case in the insurance industry. Rebates in the insurance industry are illegal, and an insurance agent or broker engaging in rebating practices can face serious consequences, including fines and revocation of an agent or broker's license. In this issue of *The E&O Report*, we will discuss New York's anti-rebate statutes and penalties that can accompany violations of these statutes, as well as practical considerations for insurance agents or brokers to follow so as to help avoid problems with rebating.

Generally, rebating is defined as a practice by an insurer, agent or broker of providing or offering an insured a valuable inducement so that the insured or prospective insured will buy insurance from that same insurer or producer. The general purpose of the anti-rebating statute is to:

- prevent the creation of a competitive disadvantage or uneven playing field for other agents or brokers in the marketplace; and
- protect insurance consumers from unfair or deceptive practices or discriminatory rates.

The most common examples of rebating occur when an agent or broker agrees to reduce a commission on a policy so that an insurance company will reduce the premium owed by the insured. It can also occur when the agent or broker returns to an insured a portion of a commission earned on a policy as an inducement to buy or maintain an insurance policy. However, as we discuss below, rebating encompasses more than simply returning or reducing commissions to effectuate a sale or maintain a customer relationship.

New York has two separate anti-rebating statutes. Under N.Y. Ins. Law § 2324, which is applicable to property and casualty insurance, agents and brokers are prohibited from directly or indirectly offering rebates, inducements or valuable consideration, other than an article of merchandise not exceeding \$15 in value, in connection with the sale of insurance when such rebates or inducements are not specified in the insurance policy. N.Y. Ins. Law § 2324 provides a penalty of \$500 for each violation. In the alternative, the Superintendent of Insurance may decide to either refuse to renew, revoke or suspend the license of the agent or broker engaging in illegal rebating activity pursuant to N.Y. Ins. Law § 2110(a)(1) or impose "a penalty in a sum not exceeding \$500 for each offense, and a penalty in a sum not exceeding \$2,500 in the aggregate for all offenses," pursuant to N.Y. Insurance Law § 2127(a).

N.Y. Ins. Law §4224, which applies to accident and health insurance as well as life insurance and annuities, prohibits an agent or broker from offering any valuable consideration or inducement, directly or indirectly, in connection with the sale of insurance when such offering is not specified in the policy. A violation of N.Y. Ins. Law § 4224 may result in the imposition of a penalty pursuant to N.Y. Ins. Law § 109, and with respect to a licensed insurance agent, suspension, revocation or non-renewal of such license pursuant to N.Y. Ins. Law § 2110.

While the statutes are similar in most respects, there is one fundamental difference. With respect to the sale of property and casualty insurance, an agent or broker is allowed to provide an insured or prospective insured with an “article of merchandise” not exceeding \$15 in value. This has been called the “keepsake” exception and requires that the merchandise has conspicuously stamped or printed on it the advertisement of the insurer, agent or broker. Typical “keepsakes” include such items as pens, calendars, key chains and flashlights. On the other hand, gift cards, gift certificates, tickets to special events and meals do not meet the “keepsake” criteria specified by the statute. There is no similar “article of merchandise” exception under the anti-rebate statute for accident, health and life insurance.

As mentioned above, rebating can involve more than simply reducing or returning commissions. The anti-rebate statutes can and do impact how an agency or brokerage markets itself to promote its services and insurance products, both to prospective insureds and existing customers. For the past several years, the New York State Insurance Department’s Office of General Counsel has authored a number of advisory opinions concerning rebating and the marketing practices of insurance agencies and brokerages. Specifically, the Insurance Department has identified the following practices as being in violation of, or potential violating, New York’s anti-rebating statutes:

1. a licensed agent providing a \$15 gift certificate toward the cost of a six-hour defensive driving class or a \$5 gas card to insureds or prospective insureds^[1]
2. a proposed newspaper advertisement that states “free \$15 gas card for any new client who brings in both their auto and homeowner Insurance policies for a free quote. And you may save hundreds of dollars”^[2]
3. an offer by an insurance broker to supply a free cellular phone device to those that complete an insurance application^[3]
4. a licensed insurance producer providing prospective insureds who seek an insurance quote on the Internet a free coupon to cover the \$10 charge for insureds to be listed in an on-line directory to advertise their businesses^[4]
5. a licensed insurance producer giving insureds a free Carfax vehicle history report with every vehicle insured through the producer’s office^[5]
6. an insurance agency offering a free car wash to prospective clients to whom the agent is providing an automobile and home insurance quote^[6]
7. a bank offering a customer a lower interest rate on an automobile loan on the condition that the customer purchases automobile insurance from an insurance agency owned by the bank^[7]

These are only a few examples of marketing practices by insurance agents or brokers in which the Insurance Department has viewed as violations or potential violations of New York’s anti-rebate statutes.

Interestingly, the state Insurance Department has also been aggressive in applying the anti-rebating law against insurers. In December, a major property and casualty insurer in New York settled charges brought by the Insurance Department that it had engaged in the practice of rebating. Specifically, the Insurance Department alleged that this insurer was systematically non-renewing homeowner policies if the policyholders did not have other insurance (i.e., automobile, life) with the insurer as of a certain past date. When it learned of this practice, the Insurance Department issued [Circular Letter Number 11](#) of 2007, advising all property and casualty insurers in New York State that such “tying” practices violated the state’s anti-rebate statute contained in Insurance Law §2334. When this insurer continued the practice after the Circular Letter was issued, a formal citation was issued by the Insurance Department. The charges were recently settled, with the insurer agreeing that individuals whose homeowners insurance policies were improperly non-renewed would have the opportunity to obtain new homeowners coverage with the company.

As a practical matter, insurance agents and brokers should evaluate whether their marketing activities could possibly run afoul of New York's anti-rebate statutes before engaging in any promotional or marketing campaign. For example, the agent or broker should determine whether any promotional items that might be given away as part of a marketing campaign are freely distributed to the general public and not tied to any sale or solicitation of insurance. With respect to the sale of property and casualty insurance, the agent or broker should make sure that promotional items provided to insureds or prospective insureds fall within the "keepsake" exception of N.Y. Ins. Law § 2324. That is, the article of merchandise should be valued at less than \$15 and conspicuously contain the advertisement of the agency or brokerage printed on it. Finally, if the agency or brokerage is unsure as to whether a proposed promotional or advertising effort will violate New York's anti-rebate statutes, the agency or brokerage should consider seeking an advisory opinion as to the proposed practice from the Insurance Department's Office of General Counsel. By acting carefully and in accordance with New York law governing rebating, prudent agents and brokers can hopefully avoid any allegations that they engaged in illegal rebating practices.

Submitted by:

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^[1] New York State Insurance Department, Office of General Counsel, Opinion No. 04-08-03, dated Aug. 3, 2004

^[2] New York State Insurance Department, Office of General Counsel, Opinion No. 03-05-05, dated May 7, 2003

^[3] New York State Insurance Department, Office of General Counsel, Opinion No. 01-11-07, dated Nov. 7, 2001

^[4] New York State Insurance Department, Office of General Counsel, Opinion No. 06-12-07, dated Dec. 8, 2006

^[5] New York State Insurance Department, Office of General Counsel, Opinion No. 06-05-01, dated May 1, 2006

^[6] New York State Insurance Department, Office of General Counsel, Opinion No. 07-07-07, dated July 13, 2007

^[7] New York State Insurance Department, Office of General Counsel, Opinion No. 07-08-08, dated Aug. 28, 2007

Lustig & Brown, LLP concentrates its practice in the defense of agents' and brokers' errors and omissions litigation and insurance coverage litigation. Kindly direct comments to James C. Keidel at the New York City office of Lustig & Brown at 28 West 44th Street, 20th Floor, New York, New York 10036, or to R. Scott Atwater at P.O. Box 9077, Buffalo, New York 14231-9077, or to James C. Keidel or Christopher B. Weldon at the Stamford, Connecticut office of Lustig & Brown, LLP at 1177 Summer St., Stamford, Connecticut 06905. Lustig & Brown, LLP also has an office located at 744 Broad Street, 16th Floor, Newark, NJ 07102.

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