

December 30, 1975

SUBJECT: INSURANCE

CIRCULAR LETTER NO. 23 (1975)

TO ALL AUTHORIZED INSURERS, AGENTS AND BROKERS

SUBJECT: REVISED REQUIREMENTS IN RELATION TO GROSS PREMIUMS AND RETURN OF GROSS UNEARNED PREMIUMS BY AND TO PREMIUM FINANCE AGENCIES

On February 3, 1971, the Insurance Department issued Circular Letter No. 2(1971) concerning premium payments and the return of unearned premiums on financed insurance policies.

Such Circular Letter in part permitted an insurer to send a net return premium to an agent or broker and request him to voluntarily contribute the difference and then transmit the gross amount of the unearned premium to the finance agency.

The permitted practice has resulted in a large volume of complaints lodged with the Insurance Department seeking the Department's assistance in recovering gross unearned premiums. On many occasions the finance company only requests that the producer return the balance of its account owing from the borrower (the insured) which often is less than the gross unearned premium. This lesser amount is remitted by the producer and the insured, in most cases unknowingly loses the difference.

Section 153(4) of the Insurance Law, as amended by L1973, c.719 § 1, requires the insurer upon the cancellation of a financed insurance policy to return the gross unearned premium to the finance agency for the benefit of the insured.

The foregoing practices have resulted in violations of Section 153(4) of the Insurance Law and a new Circular Letter No. 23 (1975) is intended to establish procedures consistent with the requirements of Section 153(4) of the Insurance Law. Circular Letter No. 2(1971) dated February 3, 1971 is hereby rescinded and is superseded by Circular Letter No. 23 1975, dated December 30, 1975.

TO ALL AUTHORIZED INSURERS, AGENTS AND BROKERS

Premium Finance Agencies Must Remit Gross Premiums And In The Event Of Cancellation The Prompt Return Of Gross Unearned Premiums Is The Responsibility Of The Insurer. \*

\* The Banking Department which administers Article XII-B of the Banking Law, "Insurance Premium Finance Agencies", is bringing this Circular Letter and the contents thereof to the attention of all premium finance agencies.

Commissions to agents and brokers are payable by the insurer -- not the insured -- and a premium finance agency may not, even by agreement with the insurer, remit to it net, rather than gross premiums, nor may the insurer accept from it less than the gross premium payable.

Similarly, in the event of cancellation, a premium finance agency must accept only gross unearned premiums and any agreement to the contrary is in violation of law. Section 153(4) of the Insurance Law states that:

"Whenever an insurance contract is cancelled in accordance with section five hundred seventy-six of the banking law, the insurer or insurers within a reasonable time not to exceed sixty days after the effective date of the cancellation shall return whatever gross unearned premiums are due under the insurance contract or contracts on a short rate basis to the bank, lending institution, premium finance agency or sales finance company effecting the cancellation, for the benefit of the insured or insureds." \*\*

\*\* No insurer can refuse to recognize the right of a premium finance agency to cancel an insurance contract provided that such cancellation is in compliance with Section 576 of the Banking Law. This right is not affected by the premium finance agency advancing the premium to an insurance agent or broker in accordance with Section 554(8) of the Banking Law.

Section 576 (1)(f) of the Banking Law similarly states that:

"The insurer or insurers within a reasonable time not to exceed sixty days after the effective date of cancellation, shall return whatever gross unearned premiums are due under the insurance contract or contracts on a short rate basis to the premium finance agency for the benefit of the insured or insureds."

The insurer is liable to the agent or broker for commissions and may not pay commissions to anyone other than a licensed producer. An insurer may not pay or delegate its responsibility for paying commissions to a premium finance agency. Nor may a premium finance agency, in the event of cancellation, accept the return of net unearned premiums or promise to hold the insurer harmless for failure to pay the difference between net and gross unearned premiums.

The following is a permissible procedure to be employed by insurers for returning gross unearned premiums to premium finance agencies, subsequent to cancellation of insurance policies, in accordance with the provisions of Section 153(4) of the Insurance Law.

An insurer may send a gross return premium to an agent or broker for transmission to a premium finance agency provided that the gross unearned premium is returned to the finance agency within 60 days from the date of cancellation. Such producer may neither deduct any unpaid earned commission therefrom nor make any set-off against an open account with an insured. The producer's remedy in the case of unpaid commissions runs only against the insurer.

The payment of commissions on the sale of insurance policies and the return of unearned commissions upon the cancellation of insurance policies prior to expiration is a matter of agreement or contract between the producer (agent or broker) and the insurer. The insured is not a party to such agreement and is not obligated or responsible in any way for the payment of earned commissions or for the return of unearned commissions which is solely a matter of concern between the insurer and the producer.

After an insurance policy is cancelled, Section 153(4) of the Insurance Law mandates that the insurer shall return the gross unearned premium. By remitting a net unearned premium to its producer who forwards the same to the finance agency without adding the amount necessary to constitute a gross return premium, the insurer is in violation of Section 153(4) of the Insurance Law. The insurer also imposes the burden upon the finance agency to attempt to collect the balance of the unearned premium from the producer, who may not be responsible therefor, and which often results in complaints being lodged with the insurance Department concerning the same.

In general, a broker has earned his commission in full when the policy has been issued and the premium paid. Under these circumstances the broker is under no obligation to make any refund of a portion of his commission to the insurer.

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\* Exceptions to this general rule, as set forth in the, case *Western National Insurance Co. v. Haph*, 277 App. Div. 6 97 N.Y.S. 2d 447 (1st Dept. 1950), aff'd 302 N.Y. 678 (1951), may apply where the broker has made an agreement to refund a portion of his commission in the event of cancellation or where the policy is an audit policy, or where the broker has induced the cancellation.

The New York Automobile Insurance Plan and the New York Property Insurance Underwriting Association furnish two examples of refund agreements. The rules of both facilities provide that, in the event of the cancellation of a policy placed through them, the producer of record shall return the unearned portion of the commissions. The application forms contain such a provision which is signed by the producer.

The right of an agent to retain commissions under like circumstances would be dependent upon the terms of the agency contract between himself and the insurer.

It is expected that this Circular Letter, by informing all of the above Department licensees of their duties and of the rights of insureds and premium finance agencies, will eliminate the number of complaints which have been received in these areas.

[SIGNATURE]

Thomas A. Harnett

Superintendent of Insurance