

November 15, 1989

SUBJECT: INSURANCE

Circular Letter No. 13 (1989)

November 15, 1989

TO: ALL PROPERTY/CASUALTY INSURERS LICENSED IN NEW YORK STATE
ALL INSURERS LICENSED TO WRITE ANNUITIES IN NEW YORK STATE
ALL INSURANCE PRODUCER ORGANIZATIONS
ALL NEW YORK LICENSED INSURANCE AGENTS AND BROKERS

RE: REBATING OF COMMISSIONS RECEIVED FOR PLACEMENT OF STRUCTURED SETTLEMENT OR
AWARD ANNUITIES

Chapter 294 of the Laws of 1985 added a new Article 50-A to the Civil Practice Law and Rules ("CPLR") requiring, in actions to recover damages for dental or medical malpractice, that awards of future damages in excess of two hundred fifty thousand (\$ 250,000.00) dollars be paid in periodic installments, unless otherwise ordered by the court. Periodic payments may be spread up to, but not more than, ten (10) years. Security must be posted by the defendant(s) or their insurance carrier(s) in the form of an annuity contract, issued by a qualified insurer and approved by the Superintendent of Insurance and the court entering the judgment. Chapter 682 of the Laws of 1986 added a new Article 50-B to the CPLR, applying nearly identical requirements to those set out above to actions to recover damages for personal injury, injury to property and wrongful death.

The Department has recently learned of certain practices by some parties involved in the placement of annuity contracts required as security for structured settlements or awards to be paid in periodic installments. Some of these practices violate the Insurance Law, in particular Section 2114, Section 2103(i) and Section 4224, which prohibits discrimination and rebating in the sale of annuity contracts.

Typically, an insurer issuing such an annuity contract pays a commission to the agent who produces the business. With regard to annuity contracts written to fulfill the security requirements under the CPLR, some property/casualty insurers purchasing the annuity contracts have been requiring, as a condition of giving the business to an agent, a rebate of a portion of the commission. In some cases, the rebate is made to the property/casualty insurer's subsidiary, which may be a licensed agent, but which does not perform any services in placing the annuity contract on which the commission is purportedly earned and paid. In other cases the rebate is paid directly to the property/casualty insurer itself.

In other instances, agents reportedly offer to reduce their commissions by rebating directly to the property/casualty insurer purchasing the annuity contract.

Section 2114 of the Insurance Law specifies the parties that may lawfully be paid all of, or share in, the commission earned for the placement of an annuity contract. A property/casualty insurer purchasing an annuity does not come within that definition. While a subsidiary of the property/casualty insurer might qualify, a commission may only be paid as compensation for services performed resulting in the sale of a product, in this case the annuity contract. Unless an entity is eligible to receive a commission under Section 2114 and performs services that bring about the sale of the annuity, such entity may not properly receive any portion of the commission. Where an agent, which is a subsidiary of

the property/casualty insurer, actually performs acts that could entitle it to receive a commission, the limitations set forth in Section 2103(i) of the Insurance Law (as they relate to the receipt of commissions earned on insurance of properties or risks of the parent insurer) must be considered.

Therefore, whether it is the agent placing the business or the property/casualty insurer proposing to share the commission earned on the sale of the annuity contract, both parties would be in violation of the Insurance Law, unless the applicable requirements outlined above are satisfied.

Questions regarding this Circular Letter should be directed to the attention of either:

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Very truly yours,

JAMES P. CORCORAN

SUPERINTENDENT OF INSURANCE