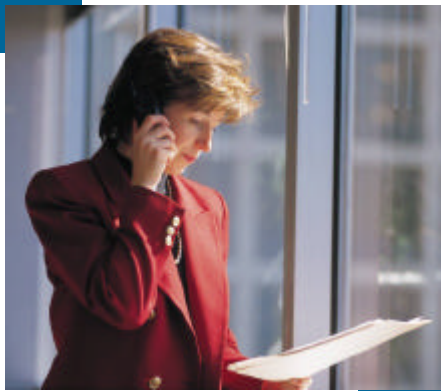




Terminating an Independent Insurance Agent — Breaking Up Is Hard To Do

Consider this scenario: The relationship between your company and an independent insurance agent that represents it has deteriorated. Efforts to overcome your differences are futile and an amicable parting appears unlikely. The difficult business decision is made to terminate the relationship. But, before taking steps to formally end the relationship, a host of contractual, statutory and regulatory issues must be addressed. Getting a good handle on the various requirements that must be met when terminating an insurance agent is a big challenge for insurers – especially insurers doing business in various jurisdictions.



Your company’s agency agreement is only the starting point for identifying your obligations to the agent. In addition to your contractual obligations under that agreement, you also have a variety of statutory

and regulatory obligations to the agent. As a rule of thumb, to the extent that inconsistencies exist between the agency agreement and the insurance laws and

“Your company’s agency agreement is only the starting point for identifying your obligations to the agent.”

regulations of the applicable jurisdiction, you must generally fulfill the provisions that are more favorable to the agent. And, if the agent writes business for your company in more than one jurisdiction, you must comply with the applicable laws and regulations of each of those jurisdictions with respect to the applicable policyholders.

It is important to realize that your obligations to the agent depend, in large part, on the exact reason(s) why the agent is being terminated. If the agent is not being terminated “for cause”, then most jurisdictions require you to provide certain “post-termination” business continuation benefits to the agent. What constitutes “for cause” varies from

(Continued on page 3)

Dear Executive:

A number of senior insurance executives have mentioned to us that it would be helpful to them to receive a newsletter that alerts them to trends that are occurring relative to the complex regulatory requirements in their industry, without the typical legalese that normally accompanies newsletters on these topics. *The Jaeckle Advisory: Insights on Insurance* is designed to specifically provide you with an overview of the trends and best practices we see occurring in the industry. In this issue, we address two topics that concern most senior executives in the insurance industry: Terminating an Independent Agent and Agency Agreements.

We hope you find these articles interesting and informative. If there are other topics that you would like covered in future issues, please let us know.

Sincerely,

James J. Tanous

Inside This Issue

TERMINATING AN INDEPENDENT INSURANCE AGENT1

AGENCY AGREEMENTS.....2

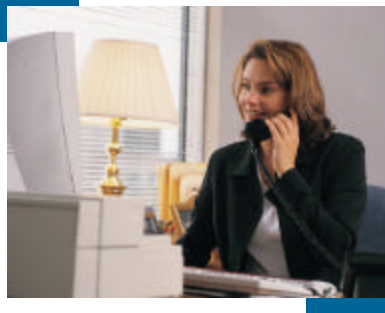
Agency Agreements: Out with the old ... In with the new

When was the last time your company took a close look at its agency agreement? If you do not know the answer to this question or the answer dates back more than just a few years, it may be time to review and update that agreement.

An insurance company should regularly review its agency agreement not only to make sure that important company business and procedural issues are up-to-date, but also to make sure that any provisions required by applicable laws and regulations are included. For example, a New York insurance regulation mandates that all insurers require, by contract or otherwise, that persons or

obtain, and, in some instances, maintain much of this information on behalf of the insurers which they represent, it is imperative that insurers contractually require their agents to maintain the pertinent records in accordance with that regulation. Your company's agency agreement is the logical place to include these important record retention requirements.

Here are some additional issues you should consider when reviewing your company's current agency agreement:



“An insurance company should regularly review its agency agreement”

entities authorized to act on their behalf in connection with their insurance business retain certain records that the insurer would otherwise be required to maintain for six calendar years after the date the policy is no longer in force or until after the filing of the report on examination in which the policy record was subject to review, whichever is longer. This regulation also requires, among other things, that those records be maintained in certain forms and that they be readily available and easily accessible to the New York Superintendent of Insurance. Because insurance agents are the entities which generally

- Does the agreement provide up-to-date information concerning your company's procedures regarding the electronic transmission and retrieval of data? For example, if your company expects its agents to access and retrieve information electronically via the company's website and/or to have the capabilities to receive important company information via e-mail, your agency agreement should include provisions in those regards.

- Does the agreement include provisions regarding the privacy and confidentiality of applicants', policyholders', claimants' and insureds' nonpublic personal information? Such a provision may be desirable in

light of recent federal and state laws and regulations concerning privacy and confidentiality.

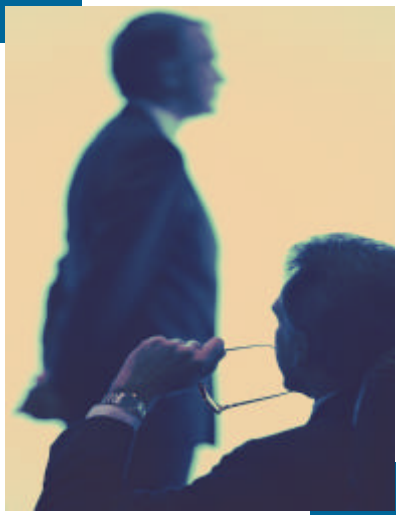
- Does the agreement cross-reference all your company's separate guidelines (e.g., binding authority and underwriting guidelines) and programs and require each agent's compliance with those items?
- Does the agreement require the agent to maintain an E&O policy with limits of liability acceptable to your company?
- Does the agreement contain an indemnification provision which adequately protects your company?
- Does the agreement contain an arbitration or other form of alternative dispute resolution clause that covers disputes with the agent?

There are, of course, many other issues which should be considered when reviewing and updating your company's agency agreement. Whether your company's agency agreement needs just a few tweaks or a major overhaul, we can help. The attorneys at Jaeckle Fleischmann & Mugel, LLP have substantial experience in drafting and revising agency agreements and would be happy to assist your company. If you have any questions, you may contact James J. Tanous, Esq. at 716.843.3905 or by e-mail at jtanous@jaeckle.com or Joann S. Lipinski, Esq. at 585.425.7718 or by e-mail at jlipinski@rochester.rr.com. ♦

Terminating an Independent Insurance Agent — Breaking Up Is Hard To Do

(Continued from page 1)

jurisdiction to jurisdiction. Conversely, if the agent is being terminated for one or more statutorily recognized “for cause” reasons (e.g., failure to pay moneys due to the company after receipt of a written demand or gross misconduct), those post-termination business continuation benefits are usually not applicable to the agent. Also, if the agent is being terminated for reasons bearing on its “trustworthiness”, then your company may be obligated to inform the applicable Insurance Department of the



specific circumstances surrounding the termination. Under certain circumstances, some jurisdictions (such as Pennsylvania) require insurers to make a reasonable attempt at rehabilitating an agent for a certain period of time before that agent can be terminated.

Generally, the “post-termination” business continuation benefits that must often be afforded to agents who are not terminated “for cause” include: (1) accepting *new business* from the terminated agent for a certain period of time; (2) continuing to renew *existing business* written through the terminated

agent for certain periods of time; and (3) paying *commissions* to the terminated agent for policies that the agent continues to service after termination. The rules with respect to these “post-termination” benefits are often confusing. For example, with respect to the payment of commissions, certain jurisdictions require an insurer to pay a terminated agent the insurer’s “prevailing” or “current” commission rate for the applicable lines of insurance, while other jurisdictions require an insurer to continue to pay the terminated agent the commission rate in effect for the applicable lines of insurance at the time the agency agreement was terminated (or the commission rate that had been paid to the agent for a certain period of time prior to the termination), while the statutory schemes in other jurisdictions are completely silent on the issue of commissions to terminated agents. In New York, an insurer is required to pay its “prevailing commission rate” with respect to personal lines policies continued through a terminated agent under the statute but the “commission rate applicable to [the terminated agent] ... at the time of termination” with respect to commercial lines policies.

Not only does an insurer have certain obligations to a terminated agent, but it also has obligations to the *insureds* placed with the company by the agent. For example, in New York an insurer cannot simply cancel or non-renew all insureds placed with the insurer by the terminated agent. Rather, unless the agent is being terminated “for cause” (i.e., gross and willful misconduct, failure to pay moneys over to the company after receipt of a written demand therefor, insolvency, abandonment or revocation of agent’s license), then each per-

sonal lines insured placed by the agent with the company must receive an “offer letter” from the company which contains certain offers of continued service through the terminated agent. Those “offer letters” must generally be sent at or before each insured’s next

“Not only does an insurer have certain obligations to a terminated agent, but it also has obligations to the insureds placed with the company by the agent.”

annual renewal (after written notice of termination has been sent to the agent). To complicate matters, the “offer letter” which must be sent to a personal lines automobile insured depends upon *when* the policy was initially voluntarily written. For example, the New York Insurance Law makes a distinction between personal lines automobile insurance policies initially written prior to August 2, 2001 (which have a one-year required policy period and are subject to the 2% and 2-for-1 non-renewal rules of §3425) and personal lines automobile insurance policies initially written on or after August 2, 2001 (which have a three-year required policy period and are not subject to the 2% and 2-for-1 rules of §3425), resulting in different “offer letters” to personal lines automobile insureds depending upon **when** their policies were initially written. Different sets of rules also apply to “other personal lines” policies (e.g., homeowners) and commercial lines policies (which may generally be non-renewed at the end of the one-year required policy period).

(Continued on page 4)

(Continued from page 3)

To further complicate matters, the “Property/Casualty Insurance Availability Act” passed on June 20, 2003 by the New York State Legislature will, if signed into law by Governor Pataki, reinstate the one-year required policy period and the 2% and 2-for-1 rules of §3425 for the period of time from the effective date of the Act through June 29, 2006 (unless further extended).

What does all of this mean for an insurer terminating a New York independent insurance agent? It means that the “offer letter” that each insured must receive depends upon the *type* of policy involved, and, if the policy is a personal lines automobile policy, *when* that policy was initially written. Understanding the differences applicable to each policyholder is crucial to ensure that he or she is provided with the proper “offer letter”. Your company must also be prepared to put into place a framework for handling each insured’s election under his or her “offer letter”.

Once your company has a firm grasp of its contractual, statutory and regulatory obligations, written notice of termination must be prepared and sent to the agent. The following is a checklist of a few of the issues to keep in mind when preparing a termination letter with respect to a **New York** insurance agent:

- Does the termination letter provide the appropriate minimum number of days notice of termination (under **both** the agency agreement between

the parties and Regulation 90 (if applicable))? Regulation 90 is applicable only to policies of personal lines automobile insurance and/or policies of fire or fire and extended coverage and to contracts or accounts of agents writing those coverages. Regulation 90 requires that, unless an insurer is alleging that the agent has acted in an “untrustworthy manner”, a minimum of 30 days written notice of termination must be provided to the agent. Again, it is important to remember that if your company’s agency agreement provides for a *greater* number of days written notice of termination, then that greater notice period will apply.

- Does the first page of the termination letter contain the geographic redlining notice required by Regulation 90?
- Does the termination letter indicate the specific reason(s) for the termination of the agency relationship as required by Regulation 90?
- Does the termination letter provide information concerning how your company will handle new business, the continuation of old business and the payment of commissions as per §§ 3425 and 3426 of the New York Insurance Law (to the extent applicable)? (Under certain circumstances it may be desirable to address these issues in a separate letter.)

- Is the termination letter being sent in accordance with all requirements of your company’s agency agreement? For example, many agency agreements require notices to be sent by certified mail, etc.

It is also important to remember that, in virtually all jurisdictions, your company must provide written notice of the termination to the applicable Insurance Department. For example, in New York an insurer must complete and file a “Company Notice Form” (Form AGT-1) with the New York Insurance Department at the time the agent is provided with written notice of termination.

In many jurisdictions, compliance with the requirements of the Insurance Law pertaining to policyholders and terminated agents will be made at the time of market conduct investigations. Companies that fail to comply with these requirements may be subject to monetary penalties.

There are a host of other issues that must be considered and addressed before terminating any insurance agent and an insurance agent should only be terminated in consultation with legal counsel. The attorneys at Jaeckle Fleischmann & Mugel, LLP have significant experience in agency termination matters. If you have any questions, please contact James J. Tanous, Esq. at 716.843.3905 or jtalous@jaeckle.com, Joseph P. Kubarek, Esq. at 716.843.3862 or jkubarek@jaeckle.com or Joann S. Lipinski, Esq. at 585.425.7718 or by e-mail at jlipinsk@rochester.rr.com. ♦

Jaeckle Fleischmann & Mugel, LLP
Fleet Bank Building
Twelve Fountain Plaza
Buffalo, New York 14202-2292
Phone: 716.856.0600
Fax: 716.856.0432
www.jaeckle.com

© Jaeckle Fleischmann & Mugel, LLP 2003

INSURANCE GROUP

Joseph P. Kubarek, Esq.716.843.3862; jkubarek@jaeckle.com
Joann S. Lipinski, Esq.585.425.7718 ; jlipinsk@rochester.rr.com
James J. Tanous, Esq.716.843.3905; jtalous@jaeckle.com

This Insights on Insurance has been prepared by the insurance lawyers at the law firm of Jaeckle Fleischmann & Mugel, LLP, and is intended for general information purposes only and should not be considered legal advice. You are urged to contact a professional advisor concerning any specific question you may have relating to your own situation.