



# LEGISLATIVE POSITION

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### **Allow agents to request policy cancellation for nonsufficient funds premium check returns**

**SUPPORT:** Allow agents in New York to request policy cancellation when they accept a client's check that subsequently bounces, and that agent has paid the company out of the agency account.

Currently, a controlling opinion by the New York State Insurance Department considers the agent in these circumstances to have loaned the client the money, and the company to have been paid—leaving the agent with recourse only against the client [OGC opinion, June 1, 2007].

Unlike New York, both Connecticut and New Jersey allow agents to request cancellation of the policy in such circumstances, provided they fulfill the requirements of the state laws that permit them to do so. In Connecticut, for example, if a producer advances payment of premium on behalf of a commercial lines policyholder and the insured is delinquent in paying the producer, the producer may request pro-rata cancellation unless cured within 15 days of sending the insured a written notice of intent to cancel. [Section 38a-716. (Formerly Section 38a-716). Premium advancing by producer. Cancellation of policy.] Similarly, in New Jersey, a producer is allowed to make a written request for cancellation. [N.J.A.C. 11:17C-2.2(d)].

The New York Insurance Department has long held that where an insurance agent or broker ("producer") accepts an insured's check in payment of an insurance premium, deposits the check in its own account, and then uses its own check in payment of the premium prior to the insured's check being dishonored by the bank on which it was drawn, the producer's sole recourse is to proceed against the insured for issuing a dishonored check. [See, e.g., OGC Opinion No. 06-08-07 dated Aug. 3, 2006; OGC Opinion No. 05-12-12 dated Dec. 12, 2005; OGC Opinion No. 02-01-06 dated Jan. 4, 2002; OGC Opinion dated Dec. 17, 1996, and OGC Opinion dated Dec. 9, 1975.] Although the payment of a premium with a dishonored check is not a valid premium payment to the insurer, the insurer is deemed to receive a valid payment of the premium by way of the producer's check that was honored by the bank. [See OGC Opinion dated Dec. 9, 1975.] By substituting its check for that of the insured, the insurance producer in effect makes a loan to the insured, with the insured's check serving as security for the loan.

PIANY has long stressed that an insurance producer that receives the premium money in a fiduciary capacity is not, in fact, making a loan or advancing premium, but is merely passing the insured's money through the premium account and forwarding the producer's check to the insurer. However, in a Dec. 17, 1996, opinion responsive to that conclusion, the department adhered to its view that, in accepting and depositing the insured's check into its own account, the producer acts at its peril and has no right to seek reimbursement from the insurer. The sole exception noted in that opinion was with regard to a policy issued under the New York Auto Insurance Plan.

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Compounding this situation is the fact that the producer has limited recourse against the insured who has issued a dishonored check. The only viable options include requiring the insured to provide a certified check; declining to advance premium for the insured; having the insured make the check payable to the insurer and then transmitting that check to the insurer; or endorsing a check that has been made payable to the agent or broker and then transmitting it to the insurer. [See OGC Opinion No. 06-08-07 dated Aug. 3, 2006.]

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