



STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

Andrew M. Cuomo
Governor

James J. Wrynn
Superintendent

The Office of General Counsel issued the following opinion on January 20, 2011, representing the position of the New York State Insurance Department.

Re: Dishonored Premium Checks and Sweep Accounts

Question Presented:

May an insurer issue a notice of cancellation of a property/casualty insurance policy to an insured for non-payment of premium, subject to any “grace period”¹ or other minimum requirements for cancellation, and return the premium funds to the insurance producer where: the insured provided a check to the producer for payment of the premium; the producer deposited the check into the producer’s sweep account with no intention of advancing the premium or making any type of loan to the insured; the check was subsequently dishonored after the insurer withdrew the premium funds from the producer’s sweep account; and the producer asked the insurer to return the funds that the insurer withdrew from the producer’s account?

Conclusion:

Yes. An insurer may issue a notice of cancellation of a property/casualty insurance policy to an insured for non-payment of premium, subject to any grace period or other minimum requirements for cancellation, and return the premium funds to the insurance producer where: the insured provided a check to the producer for payment of the premium; the producer deposited the check into the producer’s sweep account with no intention of advancing the premium or making any type of loan to the insured; the check was subsequently dishonored after the insurer withdrew the premium funds from the producer’s sweep account; and the producer asked the insurer to return the funds that the insurer withdrew from the producer’s account.

¹ N.Y. Ins. Law §§ 3425(a)(10) (McKinney Supp. 2010) and 3426(a)(3) (McKinney 2007), which apply to most property/casualty insurance policies, state that payment to the insurer, or to an insurance agent or broker authorized to receive the payment, is timely if the insured makes the payment within fifteen days after the insurer mails to the insured a notice of cancellation for non-payment of premium. This is commonly referred to as the “grace period.”

Facts:

The question is of a general nature, without reference to particular facts.

Analysis:

The inquirer asks whether an insurer may issue a notice of cancellation of a property/casualty insurance policy to an insured for non-payment of premium, subject to any grace period or other minimum requirements for cancellation, and return the premium funds to the insurance producer where: the insured provided a check to the producer for payment of the premium; the producer deposited the check into his or her sweep account with no intention of advancing the premium or making any type of loan to the insured; the check was subsequently dishonored after the insurer withdrew the premium funds from the producer's sweep account; and the producer asked the insurer to return the funds that the insurer withdrew from the producer's account.

The Insurance Department's (the "Department's") Office of General Counsel ("OGC") has opined that, where an insurance producer accepts an insured's check in payment of an insurance premium, deposits the check in the producer's account, uses the producer's own check to pay the premium, and then discovers that the insured's check has been dishonored by the bank, the insurer may not cancel the policy for non-payment of premium. OGC reasoned that by substituting the producer's check for the insured's check, the producer had in effect made a loan to the insured with the insured's check as security for the loan. See OGC Opinion 02-01-29 (Jan. 24, 2002); OGC Opinion 01-01-09 (Jan. 12, 2001); OGC Opinion 96-78 (Dec. 17, 1996); and OGC Opinion dated December 9, 1975.

However, in many cases, an insurance producer may enter into an arrangement with an insurer to permit the insurer to "sweep" the producer's premium trust account periodically for premiums that are due the insurer. See OGC Opinion 07-06-01 (June 1, 2007); OGC Opinion 06-06-05 (June 15, 2006); and OGC Opinion 06-05-12 (May 30, 2006). In response to inquiries, OGC also opined that except with respect to an assigned risk automobile insurance policy, an insurer may not cancel a policy for non-payment of premium when the insured's check that had been deposited in the insurance producer's sweep account was dishonored and the insurer had already withdrawn funds from the producer's account representing the premium. See OGC Opinion 07-06-01; OGC Opinion 06-06-05; and OGC Opinion 06-05-12. OGC reasoned that there is no significant difference between an insurance producer issuing a check to an insurer and a producer authorizing an insurer to withdraw premium funds directly from the producer's account. See OGC Opinion 06-05-12. In both cases, OGC reasoned that the insurance producer is effectively advancing the premium monies and the insurer has been paid. See id.

When last asked to reconsider its position in 2007, OGC concluded that, given its long-standing position and the lack of compelling statutory or case law to the contrary, OGC saw no reason to alter its position. However, now OGC believes that where the sweep account is set-up at the behest of the insurer, an insurance producer should not be considered to be advancing premium funds, and that an insurer may issue a notice of cancellation of a property/casualty insurance policy to an insured for non-payment of premium, subject to the grace period or other minimum

requirements for cancellation, and return the premium funds to the insurance producer under the circumstances presented here.

As discussed above, an insurance producer often has an agreement with an insurer that permits the insurer to “sweep” the insurance producer’s premium trust account periodically for premiums that are due the insurer, and sometimes an insurer sweeps the producer’s account before an insured’s check clears. See OGC Opinion 07-06-01; OGC Opinion 06-06-05; and OGC Opinion 06-05-12. It is the Department’s understanding that while not all insurers require producers to maintain a sweep account, many insurers strongly encourage the use of sweep accounts, because the accounts make it easier to conduct business. As a result, an insurance producer does not act solely in the producer’s own interest in depositing the insured’s check in the producer’s premium trust account, but rather is facilitating the insured’s relationship with the insurer by making it easier and quicker for the insurer to receive the premium. Where the insurance producer does not in fact intend to advance the premium or make any type of loan to the insured, and the insured’s check is dishonored after the insurer has swept the producer’s premium account, the producer has not received the insured’s payment. Under those circumstances, the insurance producer should not be deemed to be financing the transaction and thus assume responsibility for the check amount merely because the producer had deposited the check.

In such a case, the producer may properly request the insurer to return the producer’s funds.² If the insurer returns the producer’s funds at the producer’s request, then the insurer has not received payment for the insurance policy. As a result, the insurer then may issue a notice of cancellation to the insured in accordance with the appropriate statutory requirements³ for non-payment of premium, subject to any grace period or other minimum requirements for cancellation.

To the extent that any OGC opinion is inconsistent with this opinion, the opinion is overruled and it should no longer be followed.

For further information, you may contact Assistant Deputy Superintendent and Counsel Paul A. Zuckerman at the New York City Office.

² Generally, except for an insurance agent, such as a managing general agent that the insurer has so authorized, an insurance producer may not request that the insurer cancel the policy.

³ The cancellation of most property/casualty insurance policies is governed by either Insurance Law §§ 3425 (for person lines insurance) and 3426 (for commercial risk insurance). Insurance Law §§ 3425(a)(10) and 3426(a)(3) define “nonpayment of premium” in relevant part as “the failure of the named insured to discharge any obligation in connection with the payment of premiums on a policy of insurance or any installment of such premium, whether the premium is payable directly to the insurer or its agent, or indirectly under any premium finance plan or extension of credit....”