COLLECTING A COMMISSION AND A FEE FOR THE SAME INSURANCE TRANSACTION

In 2005, the Georgia General Assembly imposed further restrictions on the ability of an insurance producer who is licensed as a counselor to receive compensation from both the customer and the insurer in connection with the placement of the same insurance coverage. Apparently motivated by the ongoing investigations of New York's attorney general into to the compensation practices of large insurance brokerage houses, Georgia's legislators enacted a new code section, O.C.G.A. Section 33-23-46, which prohibits a producer who is licensed as a counselor, or anyone "affiliated" with such a producer, from accepting or receiving compensation from both the customer and the "insurer or other third party" for the placement of insurance coverage unless certain disclosures are made to the customer prior to the customer's purchase of that coverage. This new statute became effective on July 1, 2005, and it makes clear what was implicit before that "an insurance producer who is not licensed as a counselor . . . may not accept or receive any compensation from the customer for the placement of insurance."

Prior to July 1, 2005, a producer who was licensed as a counselor and as an insurance agent could only receive compensation from the customer and the insurer for the placement of the same insurance coverage if (i) such coverage involved a commercial risk, (ii) the producer provided "additional ancillary services. . . in excess of acquisition services" related to the insurance aspects of the transaction, and (iii) the ancillary services to be rendered as a counselor were disclosed in writing to, and approved in advance by, the customer. These requirements are found in O.C.G.A. Section 33-23-1.1, which does not require there to be advance disclosure of, and agreement on, the fee to be charged for such ancillary services, although in today's environment such prior disclosure and agreement in writing would be a good business practice.

The new requirement added to the kind of insurance transactions described above relates to the amount of compensation to be received by the producer, or an "affiliate", from the "insurer or other third party" in connection with them. In such transactions, the producer must now obtain from the customer prior to the customer's initial purchase of the insurance coverage in question the customer's written consent that the producer, or someone who "controls, is controlled by, or is under common control with the producer" (that is, the producer's agency or another person who works for that agency or is subject to the control of the producer), may receive compensation from an insurer or other third party as a result of the customer's purchase of that insurance coverage. In addition, the producer must disclose in writing to the customer the amount of such compensation or if that amount is not known, the method for calculating it in "readable language" and "if possible, a reasonable estimate of the amount."

The compensation to be received by the producer or an "affiliate" from the insurer or other third party that must be disclosed to the customer includes not only any commission that may be paid, but also any "fees, awards, overrides, bonuses, contingent commissions, loans, stock options, gifts [worth $45.00 or more], prizes, or any other form of valuable consideration, whether or not payable pursuant to a written agreement."

However, the statute states that the producer must only disclose the amount of such compensation that it expects to receive for the placement of the specific insurance coverage in question. Thus, unless it is possible for the producer to determine at the time that coverage is placed what effect it will have on any compensation the producer or his or her agency will receive based on the performance of an agency's entire book of business, it appears that no disclosure of the producer's or agency's arrangements with insurers regarding contingency payments, bonuses, etc. will have to be made.

The same may not be true with respect to overrides or other types of compensation that are paid based on the volume of the type of insurance coverage in question that is placed with an insurer where the threshold for the payment of such compensation has already been, or likely will be, reached for the time period during which such insurance coverage was placed. In this situation, it appears that a producer would have to disclose to the customer how the amount of any such override or other compensation would be calculated and provide "a reasonable estimate of the amount" of such compensation.

As always there are exceptions to the application of the above new requirements. They do not apply if (i) the compensation paid by the customer to the producer "does not exceed an amount established" by the Insurance Commissioner, (ii) the customers in question are "participants or beneficiaries of an employee benefit plan" or are "covered by a group or blanket insurance policy or group annuity contract", or (iii) the insurance coverage in question is a "renewal or any other continuation" of an already existing policy. They also do not apply to (i) persons who act "only as an intermediary between an insurer and the producer, such as a managing general agent, a sales manager, or wholesale broker", (ii) a "reinsurance intermediary," or (iii) producers who do not receive any compensation from the customer for the placement of insurance coverage.

The Insurance Commissioner is given the authority to adopt rules and regulations to implement the above new requirements, but to date no such rules and regulations have been proposed or adopted.

This article is not intended to provide "legal advice" on the issues discussed in it. It is only for information purposes. The reader should seek advice from an attorney who is knowledgeable in this area of the law about their specific situation before acting.

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