

Declaratory Ruling 88-9721-M

Prohibited rebate of commission for counseling client and implementing policy

July 18, 1988

I. BACKGROUND

Peter C. Katt is a Michigan life insurance counselor and life insurance agent. He filed a Request for a Declaratory Ruling (the "Request"), which is dated April 5, 1988. It is attached and incorporated by reference. Detailed facts and the full text of applicable statutes are set forth in the Request.

In essence, Mr. Katt asks the Commissioner to declare whether he may, consistent with statutory law, rebate to a client 100% of the commissions which are paid to him on any commission-paying life insurance policy which a client asks him to write and receive compensation solely for his time spent counseling the client and implementing the policy the client selects. In the event the Commissioner concludes the anti-rebate statutes prevent him from doing this, he would like to place commissions he receives pending judicial resolution of this matter into an escrow fund. Upon favorable judicial resolution, he would like to return to his clients these commissions, less taxes he has paid on the commissions. He would make this an option to his clients. He asks the Commissioner to issue a declaratory ruling stating that he may engage in this conduct.

Due to their interest in this matter, the Commissioner gave state and national agent, insurer, and consumer organizations an opportunity to comment upon the Request. The American Council of Life Insurance, Jackson National Life Insurance Company, the National Association of Life Underwriters, the Independent Insurance Agents of Michigan, the Michigan State Association of Life Underwriters, and the Michigan Association of Professional Insurance Agents responded to the Request. Each of them argued that the anti-rebate statutes prohibit the proposed actions described by Mr. Katt.

Declaratory rulings with respect to the applicability of statutes are governed by Section 63 of the Michigan Administrative Procedures Act of 1969, as amended (APA), MCLA 24.263; MSA 3.560(163). That section provides:

On request of an interested person, any agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. . .

Mr. Katt qualifies as an interested person under this section. If allowed to do so, the rebating of premiums will be an integral part of Mr. Katt's way of doing business. He does not raise a hypothetical issue; he has described plans that he will implement promptly. He has asked how Sections 2024, 2066, and 2070 of the Insurance Code of 1956, as amended (Code), MCLA 500.2024; MSA 24.12024, MCLA 500.2066; MSA 24.12066, and MCLA 500.2070; MSA 24.12070 (the "anti-rebate statutes"), apply to the

facts. As established by Section 200 of the Code, MCLA 500.200; MSA 24.1200, the Commissioner is charged with the execution of the laws in relation to insurance and surety business and to perform such other duties as may be required by law. Therefore, the Commissioner is empowered to issue a declaratory ruling in this matter and, moreover, has been directed to do so by the Honorable Lawrence M. Glaser of the Ingham County Circuit Court.

In remanding this matter to the Commissioner, Judge Glaser noted that the Commissioner may not get to the question of constitutionality. Many of the arguments of the interested persons listed above concern constitutionality. Those arguments place this matter in a larger context, but may not properly be addressed in this declaratory ruling.

Another matter that several interested persons commented upon is Mr. Katt's arranging for Michigan clients to purchase commission-paying policies through Florida agents that will rebate the commissions. This practice is described in footnote 2 on page 3 of the Request. However, Mr. Katt does not ask for a declaratory ruling on this activity. By the terms of Section 63 of the APA, the Commissioner issues declaratory rulings in response to requests from interested persons. It would not be appropriate, therefore, for the Commissioner to address the Florida arrangements in this declaratory ruling.

II. ISSUES

The issues presented by this request for a declaratory ruling are:

1. May an agent, consistent with the anti-rebate statutes, rebate to a client 100% of the commissions which are paid to the agent on any commission-paying life insurance policy which a client asks the agent to write and receive compensation solely for the agent's time spent counseling the client and implementing the policy the client selects?
2. During the pendency of litigation concerning the anti-rebate statutes, may the agent, consistent with those statutes, give a client an option under which the agent will escrow the agent's commissions and return them to the client if the agent prevails in court?

III. ANALYSIS

Mr. Katt proposes to rebate 100% of the commissions to be paid to him from the sale of life insurance policies. "Rebate" is the term used on page 4 of the Request in reference to the return of commissions to clients. The rebates will not be specified in the contract.

Since the anti-rebate statutes expressly prohibit rebates, it is obvious that Mr. Katt's immediate rebating of commissions would violate these laws. Section 2024 defines as an unfair act, in connection with insurance, "the . . . giving or offering to . . . give . . . any rebate of premiums payable on the contract. . . not specified in the contract. . . ." Section 2066 states that no agent shall offer or give "any rebate of, or part of, the premium

payable on the policy or on any policy, or agent's commission thereon. . . which is not specified in the contract of insurance; . . ." Section 2070 provides that no insured person shall accept". . . any rebate of premium or part thereof. . . or agent's. . . commission. . . payable on the policy. . . not specified in the policy contract of insurance."

With respect to the escrow issue, there is some scant room for interpretation. It is therefore useful to note that Michigan courts recognize that the insurance industry is of great public interest. Those courts have repeatedly stated that the insurance laws are to be liberally construed in the interest of the public, policyholders, and creditors. *Michigan Life Insurance Company v. Commissioner of Insurance*, 120 Mich App 552, 558 (1982). The legislature has determined that selling insurance by rebating is against the public interest. Interpreting "rebate" broadly will best protect the public.

There are at least three perspectives from which the proposed escrow arrangement is prohibited by the anti-rebate statutes. First, in placing commission money in escrow, Mr. Katt will be giving a contingent rebate, but a rebate nonetheless. He will have relinquished control of the money. The only condition that will need to be satisfied before the delivery of the rebate to a client is a final judicial decision in favor of Mr. Katt.

Second, the escrow arrangement violates the anti-rebate statutes because even an offer to rebate is prohibited. Although the contingency involved may arguably prevent there being a rebate until the contingency is met, at the least Mr. Katt will be making a present offer to rebate the commissions.

Third, even if the escrow arrangement did not constitute rebating, it would violate other provisions in the anti-rebate statutes. Section 2024 states that it is an unfair act for an agent to "give. . . as an inducement to. . . insurance. . . any valuable consideration or inducement not specified in the contract." Section 2066 provides that no agent shall offer or give "any other valuable consideration or inducement to or for insurance. . . which is not specified in the contract of insurance." Section 2070 prohibits an insured person from accepting "any valuable consideration or inducement not specified in the policy contract of insurance."

Money placed in an escrow fund that may go to the client is a valuable consideration. This is so even though the insured will not receive the money unless Mr. Katt ultimately prevails in court. The possibility of receiving the money is a thing of value in and of itself. Were this not so, Mr. Katt would not be interested in presenting the escrowing of his commissions as an option to his clients.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the foregoing considerations, it is FOUND and CONCLUDED that:

1. The Commissioner has authority to issue this declaratory ruling pursuant to Section 200 of the Code and Section 63 of the APA.

2. Peter C. Katt is a Michigan life insurance counselor and life insurance agent. If lawful, Mr. Katt plans to rebate to a client 100% of the commissions which are paid to him on any commission-paying life insurance policy which a client asks him to write and receive compensation solely for his time spent counselling the client and implementing the policy of the client. The rebate will not be specified in the insurance contract.
3. Sections 2024, 2066, and 2070 expressly prohibit the paying or acceptance of rebates. Mr. Katt's plan for giving clients rebates would violate these sections.
4. If lawful, during the pendency of litigation on the anti-rebate statutes, Mr. Katt plans to give his clients an option under which he will escrow his commissions and return the commissions to the clients if he prevails in court. This arrangement will not be specified in the insurance contract.
5. Escrowing commissions during the litigation would violate the anti-rebate statutes for three reasons:
 - A. It constitutes a rebating of commissions, even though it is subject to the contingency of Mr. Katt ultimately prevailing in court.
 - B. Even with a contingency involved, at the least Mr. Katt is offering to rebate the commissions. Offers to rebate commissions are prohibited.
 - C. A contingent rebate is a valuable consideration. The giving of a valuable consideration as an inducement to insurance is prohibited.

V. RULING

I therefore enter this declaratory ruling that:

1. An agent may not, consistent with the anti-rebate statutes, rebate to a client 100% of the commissions which are paid to the agent on any commission-paying life insurance policy which a client asks an agent to write and receive compensation solely for the agent's time spent counseling the client and implementing the policy the client selects.
2. An agent may not, consistent with the anti-rebate statutes, give a client, during the pendency of litigation on the statutes, an option under which the agent will escrow the agent's commissions and return them to the client if the agent prevails in court.

This ruling is limited to the facts which were presented by Mr. Katt and the statutory sections identified by Mr. Katt.

The Commissioner specifically retains jurisdiction of the matters contained herein and the authority to issue such further ruling or rulings as he shall deem just, necessary, and appropriate.

Herman W. Coleman
Commissioner of Insurance