

Declaratory Ruling 96-179-M

Payment of commissions to salaried sales employees who place policies through the Automobile Insurance Placement Facility

October 7, 1996

I BACKGROUND

The Auto Club Insurance Association ("Auto Club") has filed with the Commissioner of Insurance ("Commissioner") a request for a declaratory ruling that Section 3355 of the Michigan Insurance Code ("Code"), MCL 500.3355; MSA 24.13355, does not require the Auto Club to pay a commission to its salaried sales employees for the placement of automobile policies through the Automobile Insurance Placement Facility ("Facility"). The Facility is a statutorily-created non-profit association of insurers that provides automobile insurance to any person who is unable to procure that insurance through ordinary methods. The Auto Club further requests that the Commissioner declare that in not paying commissions to salaried sales employees, the Auto Club acted properly and in a manner consistent with Section 3355 and all other applicable provisions of the Code.

The Commissioner gave interested persons notice and an opportunity to comment on the request for declaratory ruling. The Michigan Association of Insurance Agents ("MAIA") filed a brief in support of the Auto Club's request, while the law offices of John W. Mason, P.C., by Jeffrey S. Burg, filed a brief in opposition to the request. That firm represents one or more of the salaried employees.

II APPLICABLE LAW

Section 3355 of the Code is the principal statutory provision identified by the Auto Club. It states, in pertinent part, that:

Every agent who is authorized to solicit, negotiate or effect automobile insurance on behalf of any participating member shall:

(c) Be entitled to receive, and any participating member be entitled to pay, a commission for placing insurance through the facility at the uniform rates of commission as provided in the plan of operation

III ISSUES

The issues in this declaratory ruling are:

1. Whether Section 3355 of the Code requires the Auto Club to pay commissions to its salaried sales employees for automobile policies they place through the Facility where the Auto Club is the servicing carrier.
2. If so, whether those employees may waive their right to receive the commissions.
3. If so, whether they have waived the commissions.
4. Whether Section 3355 of the Code requires a servicing carrier, other than the Auto Club, to pay commissions to the Auto Club's salaried sales employees for automobile policies they place through the Facility with that servicing carrier.
5. If so, whether those employees may assign the commissions to the Auto Club.
6. If so, whether they have assigned the commissions.

IV ARGUMENTS

In its request for declaratory ruling, the Auto Club explains that beginning in late 1991, it employed individuals known as sales account representatives who sold automobile insurance policies but did not receive commissions for doing so. In April 1995, the Auto Club eliminated the specific position of sales account representative, but it continues to employ salaried sales employees who are now called service associates who earn an annual salary of \$31,900. The Auto Club describes the duties and responsibilities of the service associates as follows: (1) developing existing insurance accounts by promoting the sale of additional insurance products to customers already using one or more Auto Club products; (2) responding to potential insureds, who either walk into or telephone Auto Club branch offices, for the purpose of selling Auto Club products; and (3) providing customer assistance in determining the need for a particular type of product or the appropriate level of coverage.

The Auto Club goes on to state that it, like other insurers, participates in the Facility. That participation may involve, among other things: (1) offering to effectuate insurance through the Facility if a qualified applicant so requests; (2) sending applications for insurance to the Facility; (3) receiving applications that are distributed by the Facility on a pro rata basis to participating insurers who are servicing carriers; and (4) servicing the automobile insurance coverage issued by the Facility. In return for this participation, the Facility sends commission checks to the Auto Club for the policies its salaried sales employees place through the Facility.

Although Section 3355 provides that every agent is entitled to receive a commission for placing insurance through the Facility, the Auto Club submits that the term "agent" as used in that section cannot be interpreted to include its salaried sales employees. The Auto Club maintains that its interpretation promotes the policy contained in Section 3303(1) of the Code, MCL 500.3303(1); MSA 24.13303(1), that every authorized insurer must preserve to the public "the benefits of price competition by encouraging maximum use of the normal private insurance system." The Auto Club states that its policy eliminates the phenomenon of salaried sales

employees receiving "double dip" compensation that would encourage the channeling of insurance applicants away from the voluntary market and into the Facility. The Auto Club submits that if salaried sales employees are allowed to be paid twice for selling policies placed through the Facility, a strong incentive for such channeling would be created.

The Auto Club also relies on Section 1202 of the Code, MCL 500.1202; MSA 24.11202, to support its position that the term "agent" includes only commissioned sales persons. The Auto Club states that Section 1202(4), in particular, supports its interpretation, because it provides that a "regular salaried officer of an insurer or a manager of an insurer may act as an agent without being licensed as an agent in the transaction of insurance for his insurer if his compensation does not vary with the amount of insurance transacted." Similarly, the Auto Club continues, under Section 1202(2), a clerical or administrative employee of an insurance agent can solicit insurance applications without a license if the activities are incidental to clerical or administrative duties and "the employee's compensation does not vary with the volume of the applications or premiums."

The Auto Club further contends that if the Legislature had wanted to require the payment of commissions, it would have enacted a statute stating that insurers "shall pay" and agents "shall receive" commissions. However, the Auto Club points out that Section 3355 merely states that participating members and agents "shall be entitled" to pay and receive commissions, respectively. The Auto Club argues that the word "entitled" should be read to mean "permitted." Rather than imposing a statutory requirement, the Auto Club submits that Section 3355 simply enables insurers and agents to engage in conduct, including the payment of commissions to agents employed by another insurer, that is generally proscribed in Section 1201(3) of the Code, MCL 500.1201(3); MSA 24.11201(3), which provides that an insurer may not employ or appoint a person to act as an agent unless that person is licensed and authorized to act on behalf of the insurer. The Auto Club asserts that the Facility provisions of the Code require agents to write policies serviced by insurers that are not their employers or with whom they have not entered into a written authorization. Thus, the Auto Club argues that it was necessary for the Legislature to enact Section 3355, which carves out a narrow exception to the general prohibitions in Section 1201(3), thereby enabling insurers to compensate outside agents who write policies placed through the Facility.

The MAIA supports the Auto Club's request for declaratory ruling. It argues that, within the American agency system, the term "agent" has a definite and well-recognized meaning that is not synonymous with the term "employee." The MAIA maintains that this system has long held that the clientele and business established by an insurance agent belongs to that agent. The MAIA states that the Auto Club's salaried sales employees do not have any individual rights to the insurance accounts they develop. Consequently, the MAIA submits that a salaried sales employee who merely sells insurance policies but does not have any ownership or property rights to the work product is not an agent.

Mr. Burg opposes the Auto Club's request for declaratory ruling and argues that the Auto Club's position is inconsistent with its past practices. According to Mr. Burg, the category of agents at issue here evolved from what the Auto Club originally called "member advisors" in 1980. Those member advisors were paid a salary plus commissions on the sale of Auto Club memberships.

They were also paid commissions on the policies they placed through the Facility. Mr. Burg represents that today's sales account representatives or service associates are the same member advisors with a different name.

Mr. Burg points out that, on December 7, 1990, the Commissioner issued a final decision in *In the matter of Auto Club Insurance Association and/or Auto Club Group Insurance Company*, Case No. 89-10137-L, in which he found that the Auto Club had violated the Code by using unlicensed agents to sell insurance. Mr. Burg represents that the Auto Club had argued that its then "customer account representatives" were not agents and that they were not soliciting insurance. However, Mr. Burg notes that the Commissioner found that the customer account representatives were, in fact, agents and they were soliciting insurance business.

Mr. Burg goes on to argue that when the Auto Club established its new, licensed sales position called service associates, those individuals immediately commenced writing all lines of Auto Club insurance, with the exception of life insurance. As licensed agents, Mr. Burg submits, the sales account representatives became subject to Section 3301 of the Code, MCL 500.3301; MSA 24.13301, the statutory scheme that created the Facility and sets forth insurers' and agents' duties to participate in that system for the benefit of the public. In Mr. Burg's view, under Section 3301, agents are both compelled to participate in, and entitled to benefit from, the assigned risk system.

More specifically, Mr. Burg points out that Section 3301 requires agents to offer to place automobile insurance through the Facility for any qualified applicant and, in return for placing that insurance, the agent is entitled to receive a commission for doing so. Mr. Burg states that this statutory entitlement to commissions is the state's way of compensating a person who writes a policy in exchange for the state's effecting a kind of government "taking" of that person's private time and effort in the service of a governmental purpose. Mr. Burg asserts that, rather than the Auto Club arranging its private compensation agreements with its agents first, and then attempting to force the insurance statutes to fit with those private arrangements, the Auto Club must incorporate the plain language of the insurance laws into the private agreements it makes with its agents. Instead of doing that, Mr. Burg submits that the Auto Club is merely seeking every avenue of profit it can find, regardless of whether it is legal.

As to the Auto Club's argument regarding channeling, Mr. Burg states that there is already an unequivocal statutory prohibition against the practice of channeling automobile insurance customers that applies to all licensed agents writing all types of automobile insurance. Specifically, Mr. Burg relies on Section 2116(1) of the Code, MCL 500.2116(1); MSA 24.12116, which provides, in pertinent part, that an insurance agent shall not attempt to channel an eligible person away from an insurer with the purpose of avoiding the agent's obligation to submit an application. Mr. Burg argues that this section must be read together with the mandate in the assigned risk statutory scheme that the Facility must encourage maximum use of the private insurance system.

V ANALYSIS

Section 3355

The Commissioner is authorized to issue declaratory rulings by Section 63 of the Administrative Procedures Act of 1969, as amended, MCL 24.263; MSA 3.560(163), which provides that:

On request of an interested person, an 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. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

The central issue in this request for declaratory ruling is the proper interpretation of Section 3355 of the Code. A fundamental rule of statutory construction is that, "[w]here the meaning of a statute is plain and unambiguous, judicial construction or interpretation is precluded." [*Joy Management Company v City of Detroit*, 176 Mich App 722, 730 (1989).] The Commissioner finds that the language of Section 3355 is plain and unambiguous. Nothing in that language limits the payment of a commission for placing insurance through the Facility to only commissioned salespeople. To the contrary, the statute expressly provides that "every agent" shall be entitled to receive a commission for placing qualified applicants with the Facility. An "agent," in turn, is one who acts as an agent, such as soliciting insurance, and therefore includes Auto Club's salaried sales representatives.

Auto Club's reliance on Section 1202 of the Code to support its position that the term "agent" includes only commissioned sales people is unfounded. Indeed, Section 1202 of the Code is irrelevant. That section contains four exceptions to the Section 1201 licensure requirement. Those exceptions do not in any way define the term "agent" but, rather, they simply define the limited circumstances under which an individual may solicit insurance business without a license. Precluding a commission payment in these circumstances does not signify that agents are only paid by commissions. Pivotaly, as Mr. Burg correctly points out, in Sections 1207, 2011, and 2116, of the Code, MCL 500.1207; MSA 24.11207, MCL 500.2011; MSA 24.12011, MCL 500.2116; MSA 24.12116, the Legislature recognized that agents may be compensated in ways other than commission arrangements. Section 2116 refers to an agent's "normal commissions or normal compensation or salary."

Auto Club's arguments relative to channeling are not persuasive. Section 2116(1)(c) of the Code contains a statutory prohibition against channeling automobile insurance customers, which applies to all licensed agents. Thus, the Auto Club's fear that "double dip" compensation will result in its salaried sales employees channeling eligible customers away from the voluntary insurance market and into the Facility is an issue that the Legislature has addressed elsewhere in the Code.

Based on the foregoing discussion, the Commissioner finds that Section 3355 of the Code requires the Auto Club to pay commissions to its salaried sales employees, who are licensed agents, for automobile insurance policies they place through the Facility.

Waiver

Having found that the Auto Club must pay its salaried sales employees commissions for policies they place through the Facility, it is necessary to determine whether those employees may then waive that entitlement.

A waiver is the voluntary and intentional relinquishment of a known right, claim, or privilege. This doctrine applies to all rights or privileges to which a person is legally entitled, provided that those rights or privileges belong to the individual and are intended only for his or her benefit. (28AmJur 2d Waivers §§154 and 161.) As the Michigan Supreme Court has held, waiver implies an election to forego some known advantage that might have been insisted upon. *Couper v Metropolitan Life Insurance Company*, 250 Mich 540; 230 NW 929 (1930). On the other hand, where a right has been given to an individual not just for his private benefit but also as a matter of public policy, that right cannot be waived by anyone.

Applying the doctrine of waiver to the factual situation presented in the Auto Club's request for declaratory ruling, the Commissioner finds that the entitlement to commissions belongs to the agents that place automobile insurance policies through the Facility. It is personal to them and, furthermore, it is not a matter of overriding public policy. A principal reason for requiring commissions is to encourage agents to meet their responsibilities. Here, the salary arrangement provides that incentive.

The Auto Club's salaried sales employees have waived their entitlement to commissions for policies placed through the Facility in return for a salary. The Auto Club states that its service associates have been instructed that they will not be entitled to commissions in connection with their placing coverage for automobile insurance applicants through the Facility. Page I-2 of Exhibit A, entitled "Employee Handbook," contains the following statement under non-voluntary business:

Note: You are not eligible to receive commissions in addition to your salary on nonvoluntary insurance policies.

Thus, employees are put on notice that one condition of their salaried status is that they will not receive commissions.

Assignment

A related issue in this declaratory ruling is whether Section 3355 of the Code requires a servicing carrier, other than the Auto Club, to pay commissions to the Auto Club's salaried sales employees for automobile policies they place through the Facility with that servicing carrier. As indicated earlier, Section 3355 provides that every agent shall be entitled to receive a commission for placing qualified applicants through the Facility. Nothing in the plain and unambiguous language of that section limits that entitlement to receiving a commission only

from a company that has employed or appointed the person as its agent. As noted in the discussion above, one apparent purpose of Section 3355 is to allow a company that has not done so to make commission payments despite the general constraints of Section 1201 of the Code.

The Commissioner therefore finds that Section 3355 of the Code requires a servicing carrier, other than the Auto Club, to pay commissions to the Auto Club's salaried sales employees for automobile policies they place through the Facility with that servicing carrier. The Commissioner further finds that the Auto Club's salaried sales employees may assign their commissions to the Auto Club. An assignment of future earnings under an existing contract is valid. *Duluth South Shore & Atlantic Railway Co. v Wilson*, 200 Mich 313; 167 NW 55 (1918). Here, the statement from the Employee Handbook that salaried sales employees are not eligible to receive commissions implies an assignment. Furthermore, a commissioned sales agent places his or her personal tax identification number or social security number on the Facility's insurance application form as the way of identifying who is to receive the commission. In contrast, the salaried sales employees place the Auto Club's tax identification number on that application, thereby indicating that the Auto Club is to receive the commission. Thus, based on these facts, the Commissioner concludes that the salaried sales employees have assigned their commissions to the Auto Club.

Conclusion

Based on the foregoing analysis, the Commissioner finds that every agent who places automobile insurance policies through the Facility is entitled to receive commissions for doing so. However, such agents may waive their entitlement to those commissions and may assign those commissions. Salaried employees of the Auto Club, in accepting their salary arrangement, have made such a waiver and assignment.

VI RULING

Therefore, it is the Commissioner's ruling that:

1. Section 3355 of the Code requires the Auto Club to pay commissions to its salaried sales employees for automobile insurance policies they place through the Facility where the Auto Club is the servicing carrier.
2. Those employees may waive their right to receive those commissions and have done so.
3. Section 3355 of the Code requires a servicing carrier, other than the Auto Club, to pay commissions to the Auto Club's salaried sales employees for automobile policies they place through the Facility with that servicing carrier.
4. The Auto Club's salaried sales employees may assign those commissions to the Auto Club and have done so.

5. The Auto Club's arrangement with its salaried sales representatives respecting commissions is not violative of Section 3355 of the Code.

This ruling is limited to the facts that were presented by the Auto Club and the statutory sections it identified in its request for declaratory ruling and those statutory provisions identified by Mr. Burg respecting agent compensation arrangements.

D. Joseph Olson
Commissioner of Insurance