

Declaratory Ruling 2001-012-M

Automobile dealer referral of customers to an insurance agency

February 14, 2001

I. BACKGROUND

Dealers Resources, Inc. (hereafter "DRI") has requested a declaratory ruling on the applicability of the Insurance Code of 1956 (hereafter "Code"), as amended, MCL 500.100 *et seq*; MSA 24.1100 *et seq*, and the Motor Vehicle Sales Finance Act (hereafter "MVSFA"), MCL 492.101 *et seq*; MSA 23.628(1) *et seq*, to a proposed offering of insurance products on the premises of a dealer that sells or leases motor vehicles.

II. ISSUES

The principal issues are:

1. Whether an insurance agency violates s 1212(1) of the Code, MCL 500.1212(1), when an automobile dealer's personnel solicit insurance for the agent without benefit of a solicitor's license.
2. Whether an insurance agency violates s 1207(3) of the Code, MCL 500.1207(3), if it rewards or compensates a dealer related agency when a customer purchases insurance upon referral by an automobile dealer?
3. Whether an insurance agency causes an automobile dealer to violate s 16(b) of the MVSFA, MCL 492.116(b), when it leads an automobile dealer to influence its customers to purchase insurance from the agency.
4. Whether an insurance agency violates s 31(c) of the MVSFA, MCL 492.131(c), when it compensates a dealer related agency for the purchase of insurance by customers directed to it by an automobile dealer who controls or manages the dealer related agency.

III. ANALYSIS

A. Authority

The Commissioner is authorized to issue declaratory rulings under Section 63 of the Administrative Procedures Act of 1969, as amended, MCL 24.263, which provides: 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 request sets forth a statement of facts sufficient to enable the Commissioner to make a declaratory ruling on the applicability of the Code and MVSFA to the stated facts.

B. Facts

The purchase or lease of a motor vehicle in Michigan that is financed will necessitate the purchase of insurance, whether to demonstrate financial responsibility for the protection of others upon registration, MCL 257.518, or for the protection of the lender's risk, MVSFA, s 16, MCL 492.116.

DRI is a licensed insurance agency with John C. Jameson serving as its officer/agent. In addition to DRI, Mr. Jameson is an officer and agent for over 300 dealer related agencies in Michigan. A "Dealer related agency" is an insurance agency connected or related to an automobile dealership that is created for the purpose of selling group credit life and disability insurance policies to the dealership. A dealer related agency is typically owned by a spouse or other relative of the automobile dealer.

DRI proposes that personnel at licensed automobile dealers be allowed to disseminate a brochure to customers that would advertise its availability to offer insurance products through a toll free 800-telephone number. DRI asserts that the current system, which does not permit automobile dealers to sell insurance, causes significant harm to a dealer because the dealer cannot deliver a vehicle to the customer until insurance is placed on the vehicle. DRI states that a lender/lessor will not pay the dealer unless the vehicle is insured.

Under the proposed arrangement, the dealership personnel would not be licensed as insurance agents or solicitors, nor would DRI have licensed agents on the premises of the dealers. The DRI brochure would solicit prospective customers to call its toll free telephone number to receive quotes on insurance coverage. DRI would take applications and, upon approval, bind coverage over the telephone.

The DRI brochure would also indicate that a prospective customer is free to consult his or her own insurance agent, and that insurance can be purchased over the Internet or through other toll free numbers, none of which are given in the brochure. In addition, the DRI brochure would clearly state that it is not mandatory for a customer to purchase insurance through a particular agent, agency, or with a particular insurer.

In its request, DRI asserts that it would always offer prospective customers premium quotes from several different insurers. In addition, DRI states that there will be no

compensation paid to the dealers or any of the dealer's employees. However, DRI proposes that it may compensate the dealer related agency based on a number of factors including sales volume and loss ratios. There is no indication in the proposal that the dealer related agency will perform any service or provide any product in exchange for compensation from DRI.

C. Statutes

The following provisions from the Code and the MVSFA are applicable to this declaratory ruling:

MCL 500.114. "Person" as used in this code includes an individual, insurer, company, association, organization, Lloyds, society, reciprocal or inter-insurance exchange, partnership, syndicate, business trust, corporation, and any other legal entity.

MCL 500.1207. (3) Except as provided in section 1212 and subsection (4), an agent shall not reward or remunerate any person for procuring or inducing business in this state, furnishing leads or prospects, or acting in any other manner as an agent.

MCL 500.1212. (1) An agent may not appoint, employ or in any manner receive the benefit of business done or services rendered in this state by a person acting as a solicitor unless that person is so authorized to act by a written contract with the agent, he is licensed as a solicitor in accordance with this chapter, and the agent has notified the commissioner in writing of the appointment.

MCL 492.116. (b) The buyer of a motor vehicle under an installment sale contract shall have the privilege of purchasing such insurance from any insurance company, agent or broker authorized to do business in Michigan other than the installment seller. No installment seller shall coerce, threaten, or in any manner influence any installment buyer to purchase insurance from any insurance company, agent or broker designated by such seller: Provided, however, that the inclusion of the cost of the insurance premium in the installment sale contract, when the buyer selects the company, agent or broker, shall be optional with the seller.

MCL 492.131. (c) An insurance company, agent, or broker shall not pay or cause to be paid, directly or indirectly, to any installment seller, nor shall any installment seller receive from any insurance company, agent, or broker, any portion of an insurance premium involved in the retail installment sale of a motor vehicle other than for the benefit of the installment buyer, and all payments shall be held by the installment seller in trust for the benefit of the installment buyer and shall be paid to the installment buyer within 30 days, unless used in procuring comparable insurance or credited to matured unpaid installments under the contract as provided in section 16(f).

D. Discussion

The Michigan Vehicle Code requires proof of financial responsibility in order to register a motor vehicle. MCL 257.45; MCL 257.517. The usual method satisfying this requirement is filing a certificate of insurance with the secretary of state. MCL 257.518. For those who finance the purchase of their motor vehicle, the MVSFA permits the lender to require insurance as security on the loan. MCL 492.116. Thus, the purchase or lease of a motor vehicle requires the purchase of insurance.

DRI proposes to make its offer for insurance products available to every customer of the automobile dealer, or in the alternative, to those customers who do not currently have insurance. The offer would be made through a brochure that would be presented to the buyer/lessee by the dealership personnel. While furnishing the brochure, and access to a telephone to make the call, DRI states that the dealer's employees would not receive premiums for insurance and would not be able to bind coverage. Under the DRI proposal, none of the dealer's employees would hold an insurance agent or solicitor's license. Likewise, no agents or solicitors from DRI would be on the dealer's premises.

The brochure would contain a toll free telephone number to DRI where a customer could receive quotes for insurance. DRI claims that it will provide premium quotes from several different insurers. DRI intends to take applications and bind coverage over the telephone. In the sale of insurance, DRI's personnel will be licensed as agents or solicitors.

DRI contends that no compensation will be paid to the dealership or to the dealer's personnel, but that compensation may be paid to the dealer related agency based on factors such as sales volume and loss ratios. Under the plan, the dealer related agency does not perform any service or provide any insurance product. Compensation under such circumstances appears to be an indirect way of rewarding the dealer for furnishing prospects.

The DRI proposal is at odds with several provisions in the Code and the MVSFA. In the first instance, DRI's proposal necessitates that the dealership employees act as solicitors of insurance on its behalf. In Michigan, "an Insurance solicitor is defined as any person acting under express authority from an agent . . . to solicit insurance for such agent, but without the power or authority to issue or countersign policies[.]" *Coverdill v Northern Insurance Co of New York*, 243 Mich 395, 397; 220 NW 758 (1928). Solicitors in Michigan are required to be licensed. MCL 500.1212. When giving customers the DRI brochure, and providing a place to telephone DRI, the dealership's employees become solicitors of insurance for a specific agency, namely DRI. Accordingly, to participate in the described program, employees of the dealership would be required under MCL 500.1212(1), at a minimum, to obtain a solicitor's license and have a written contract with the appointing agent, as well as to notify the commissioner of the appointment. In the alternative, DRI would be required to have one of its agents or solicitors on the premises of every dealer participating in the program.

DRI indicates in its proposal that while it will not directly compensate a dealership or its employees, it may compensate a dealer related agency, based on a number of factors including sales volume and loss ratios. DRI relies on a declaratory ruling [December 13, 1996] by the Commissioner of Financial Institutions as authority supporting its proposal to compensate the dealer related agency. In the declaratory ruling, Commissioner Patrick M. McQueen determined that the MVSFA did not bar an officer, director, employee, or agent of a corporate installment seller from owning or receiving compensation from a dealer related agency. However, the declaratory ruling did not consider or address the effect of s 1207(3) of the Code on the ability of a licensed insurance agent to compensate a dealer related agency for referrals made by the dealer, when that dealer related agency has performed no service.

Section 1207(3) of the Code, MCL 500.1207(3), prohibits an agent, such as DRI, from rewarding or remunerating "any person for procuring or inducing business in this state, furnishing leads or prospects, or acting in any manner as an agent." A dealer related agency falls within the ambit of the Code's definition of "person." MCL 500.114. Thus, any payment of a reward or remuneration by an agent to a dealer related agency for procuring business, furnishing leads, and so forth would be subject to s 1207(3).

In the DRI proposal the role of the dealer related agency is undisclosed. However, if the dealer related agency receives compensation, a clear potential is created for the dealer related agency to confer benefit on the dealer for procuring business or furnishing leads or prospects. The likelihood of this occurring is heightened if the dealer related agency is owned by or invested in by an officer, director, employee, or agent of the dealer. Under no circumstances may compensation go from the dealer related agency to the dealer. Otherwise, this scheme becomes a device to circumvent or avoid the prohibition of s 1207(3) by rewarding the dealer for "procuring or inducing business," or for "furnishing leads or prospects" that benefit DRI. DRI may not do indirectly what the statute directly prohibits. The Supreme Court addressed this in *Ludington Service Corp v Acting Comm'r of Insurance*, 444 Mich 481, 494; 511 NW2d 661 (1994), by stating in footnote 18, "we do not create a safe harbor for arrangements that somehow indirectly, as opposed to directly, reward a holding company for business referred to its subsidiary."

To the extent that DRI's proposed compensation to a dealer related agency would find its way to the pockets of the dealer, it is a violation of s 1207(3) of the Code. The courts have sustained the action of past commissioners when it was believed that it "was probable that petitioner would violate s 1207(3)." *THM, Ltd v Comm'r of Insurance*, 176 Mich App 772, 784; 440 NW2d 85 (1989).

Another troubling aspect of DRI's proposal is the intended compensation of the dealer related agency based on sales "volume and loss ratios." As the Supreme Court noted in *Ludington Service Corp*, a violation of s 1207(3) may occur if the commissioner can "determine how much business will ensue directly or indirectly from bank [dealer] referrals and accordingly constitute dividends inuring to the bank [dealer]." *Id* at 495. It appears from the DRI proposal that the amount of compensation to the dealer related agency would be directly dependent upon the amount of business derived from said

dealer. Accordingly, it may be a violation of s 1207(3) when the amount of compensation to a third party is contingent upon the amount of business derived from a dealer's referrals.

In the same vein, DRI's proposal conflicts with the MVSFA. Section 16(b) of the MVSFA, MCL 492.116(b), bars any installment seller [in this instance the automobile dealer] to "coerce, threaten, or in *any manner influence* any installment buyer to purchase insurance from any insurance company, agent or broker designated by such seller[.]" [emphasis added.]

DRI argues in its request that:

The current system, which does not permit the sale of insurance through an automobile dealer, causes significant harm to the automobile dealer because:

1. The dealer cannot deliver the car until the insurance is obtained because the dealer will not be paid by the lender/lessor unless the car is insured.

2. *The dealer loses control of the customer* because the customer has to wait for the insurance or even leave the dealership to obtain the insurance. This is especially true at night or on Saturday, when insurance agencies are usually closed.

3. Dealers are at a competitive disadvantage because the playing field is not level for the sale of car insurance. More particularly, while dealers are not permitted to sell private passenger auto liability/physical damage insurance, insurance companies and agents are permitted to sell products unrelated to car insurance that compete with products which are offered by automobile dealers. For example, an agent can talk a customer into not buying from the dealer, but rather, (i) lease or buy a car through the insurance agent or his sources, (ii) receive a car loan from the agent's sources, (iii) refer the customer to the Internet where he can purchase a car and (iv) sell products which are also sold by the car dealer or by the car dealer related entities, such as, credit life/disability, gap insurance, theft protection insurance, extended service contracts, and window etchings.***

4. The dealer makes no money on insurance referrals as they are handled now but his employee often makes money because in return for the referral, insurance agents often pay cash under the table to the referring sales person. [emphasis added.]

By its own words, DRI desires to keep the customer under the dealer's control, thereby interfering with the customer's right to go elsewhere for insurance. Clearly the plan contemplated by DRI is anticompetitive by working to shield the customer from the marketplace. At the same time, this plan reveals the true design of DRI to influence a customer's decision to purchase insurance because it intentionally limits choice in the

selection of insurance. Finally, DRI's statement that "the dealer makes no money on insurance referrals as they are handled now," signals their intention to profit from this proposal.

As previously discussed, the specter of dealership personnel steering, persuading, and directing customers who need insurance to DRI certainly rises to the level of "influence," and may even be deemed "coercion," depending on the facts of a specific case. DRI suggests, unpersuasively, that the legal standard should be "undue influence," and not ordinary influence. However, the statute uses the phrase "in any manner" influence, not "undue" influence. Had the Legislature meant "undue" influence, it would have so stated. The use of a specific word in the statute indicates an intent to exclude that which is not included. *People v Hoye*, 105 Mich App 768, 773; 307 NW2d 723 (1981). If DRI did not believe that dealership employees could influence customers to secure insurance from DRI, it is unlikely it would be proposing this insurance program. The proposed arrangement would be in violation of s 16(b) of the MVSFA.

Finally, the proposed conduct of DRI may also be in violation of s 31(c) of the MVSFA, MCL 492.131(c). This section prohibits an insurance company or agent from paying any portion of an insurance premium, directly or indirectly, to an installment seller. The DRI proposal contemplates payment to a dealer related agency. The Attorney General has determined that an insurer may pay a portion of a premium to a dealer related agency which is owned or operated by the spouse or other close relative of the automobile dealer, provided the dealer does not in fact control or manage the dealer related agency. OAG, 1989-1990, No 6630, p 318 (April 25, 1990). However, as noted in the Attorney General's opinion, the corporate veil may be pierced if the dealer related agency is being used to evade or defeat the purpose of s 31(c) of the MVSFA. Thus, the contemplated transaction would be prohibited if the dealer related agency was in fact under the control or management of the installment seller, or was a means to indirectly pay a portion of an insurance premium to the dealer.

E. Conclusion

Based upon the facts presented in the request for declaratory ruling, if employees of an automobile dealer solicit insurance on behalf of DRI without benefit of a solicitor's license, this conduct would constitute a violation of s 1212(1) of the Code. In addition, should DRI undertake this proposal where a dealer directs its customers to DRI for the purchase of insurance, its conduct would be in violation of s 16(b) of the MVSFA as it influences the customer's purchase of insurance and interferes with the customer's privilege of purchasing insurance from any authorized insurance company, agent or broker.

Furthermore, should DRI compensate a dealer related agency when insurance is purchased by a customer referred by a dealer, this conduct may be in violation of s 1207(3) of the Code, which prohibits an agent from rewarding or remunerating any person for procuring or inducing business, or for furnishing leads or prospects. And depending on the facts, the proposal may also constitute a violation of s 31(c) of the

MVSFA, which prohibits an agent from directly or indirectly paying an installment seller, and an installment seller from receiving, any portion of an insurance premium.

IV. RULING

Therefore, it is the Commissioner's ruling that the conduct proposed by DRI in its request for this declaratory ruling would violate the Code and the MVSFA.

Frank M. Fitzgerald
Commissioner of Financial
and Insurance Services