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1333 NEW HAMPSHIRE AVENUE, N.W.

WASHINGTON, DC 20036

(202) 457-7500

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May 3, 1989

Mr. Randy Dyer
Executive Vice President
National Structured Settlements
Trade Association
Suite 800
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Commission Rebates by Structured
Settlement Brokers

Dear Mr. Dyer:

You have requested our opinion with respect to the applicability of anti-rebating laws to certain commission-sharing practices involving structured settlement brokers. Specifically, we have been asked to analyze the three factual scenarios set forth below under the laws of New York, Illinois, Connecticut and Texas.

For purposes of our analysis, we understand that a structured settlement broker, a duly licensed life agent or broker, is usually retained by a casualty insurer^{1/} to obtain an annuity^{2/} to fund a structured settlement. Generally, the

^{1/} In some instances, the defendant or his broker will retain the structured settlement broker.

^{2/} We have reviewed sample annuity contracts issued to fund structured settlements. Since there are no features which distinguish the contracts issued in this context from those issued otherwise, we have no reason to believe that the laws discussed herein with regard to annuity contracts generally would not apply to those purchased to fund structured settlements.

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casualty insurer purchases and owns the annuity before assignment, and is considered to be the client of the structured settlement broker. However, sometimes the defendant/policyholder is the client purchaser. The structured settlement broker is compensated for his services by the life insurer which issues the annuity by receiving a percentage commission (for ease of illustration, we assume a four percent commission).^{2/} Below are the three factual scenarios to which we apply the selected states' law. We assume in each scenario that the structured settlement broker is duly licensed as a life agent and appointed as an agent of the life insurer which provides the annuity or a duly licensed life broker. Our analysis would be different if the structured settlement broker were not so licensed.

SUMMARY

We conclude that anti-rebating laws in the four States examined do appear to apply to structured settlement annuity purchases. Our conclusions on whether specific practices are lawful or unlawful are rendered on a State-by-State basis. Generally speaking, commission-sharing is permissible between agents if the agents are properly licensed and the commission is paid for services actually rendered by each. If either condition fails, the commission-sharing may be unlawful, particularly with a subsidiary of the purchaser. Some States will require that both agents be appointed by the life insurer issuing the annuity contract. Some require the agent to write a certain amount of business on risks of others than those of the agent or those affiliated with the agent. However, there is a tension between the licensing/commission-sharing statutes, which permit sharing, and the anti-rebating statutes, which would prohibit sharing where it amounts to a direct or indirect rebate to the purchaser. There has been little State enforcement of anti-rebating laws and many insurance departments' failure to apply the anti-rebating laws to "indirect" rebates may be due more to the subtlety of the transaction and the lack of specific guidance from the courts or State attorneys general on what constitutes an "indirect" rebate, than any conscious policy to permit the practice.

^{3/} It is our understanding that a four percent commission is the standard commission paid to a broker of periodic payment annuities. Hindert, Dehner, Hindert, Structured Settlements and Periodic Payment Judgments, § 4.01[1] at 4-3, n.2. (1987).

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We believe that a program to alert State regulators to the practice could be devised that would result in greater scrutiny of these practices which appear to contravene statutes. However, any such collective activity to enforce these anti-rebating laws raises a number of sensitive issues, not addressed in this memorandum, and we would welcome the opportunity to discuss these with your group. Our legal analysis is set forth below.

DISCUSSION

FACTUAL SCENARIO #1:

The structured settlement broker receives a four percent commission from the life insurer which issued the annuity. The casualty insurer which purchased the annuity requests the structured settlement broker to pay it one-quarter of the commission he earned from the life insurer. The structured settlement broker shares his commission with the casualty insurer.

A. New York Law

Under New York law, annuities may only be issued by a licensed life insurer. N.Y. INS. LAW § 4205 (McKinney 1985). The insurer may not pay any commission or other compensation to any person or business entity for services in obtaining a new annuity contract in the state except^{4/} to a licensed life insurance agent of the insurer. N.Y. INS. LAW § 2114(a)(1) (McKinney 1985). A life insurance agent, in turn, may not pay any commission or other compensation to any person or business entity for services in obtaining a new annuity contract except to another licensed life insurance agent of the life insurer. N.Y. INS. LAW § 2114(a)(2) (McKinney 1985).^{5/} New York law would prohibit the payment of a commission to the casualty insurer purchasing the annuity contract because it is an unlicensed entity for purposes of receiving a commission; it is not a life agent.^{6/}

^{4/} There are other exceptions which are inapplicable to this factual scenario.

^{5/} One cannot obtain a life broker's license in the state, but only an agent's license.

^{6/} For purposes of argument, even if the casualty insurer were duly licensed, it could not receive a commission because it did not provide any services in obtaining the annuity contract; it merely purchased the contract.

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The state's anti-rebating law would also prohibit payment of the commission to the casualty insurer. Section 4224 of the New York Insurance Law prohibits life insurers from making or permitting any unfair discrimination between individuals of the same class in the amount of return of premiums and further forbids life insurers and their agents to:

[P]lay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to any person to insure or shall give . . . any valuable consideration or inducement whatever not specified in such policy or contract^{7/}

N.Y. INS. LAW § 4224(c) (McKinney 1985). It is illegal for any person in the state to knowingly receive as such inducement, any rebate of premium or any other valuable consideration. N.Y. INS. LAW § 4224(c). Furthermore, Section 2402(b) of the New York Insurance Law declares rebating an unfair and deceptive practice.^{8/} As a result, a structured settlement broker which shared one-quarter of his commission earned from the sale of an annuity with the casualty insurer to utilize the services of the structured settlement broker would be in violation of New York's anti-rebating and unfair trade practices laws.

B. Illinois Law^{9/}

Illinois law prohibits an insured person, party or applicant for insurance to directly or indirectly "receive or accept . . . any rebate of premium or any part thereof or all or any part of any agent's or broker's commission thereon" ILL. ANN. STAT. ch. 73, § 763 (Smith-Hurd & 1965 Supp.

^{7/} We understand the New York Insurance Department's policy is to continue to enforce its anti-rebating law.

^{8/} A finding of violation of this section will subject the violator to a cease and desist order and penalties may be effected for violation of the order. N.Y. INS. LAW § 2406 (McKinney 1985).

^{9/} We are not licensed to practice law in Illinois and we must caution you that our observations contained herein with respect to Illinois law are based on our general legal experience.

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1988).^{10/} If the casualty insurer described in this scenario applied for an annuity contract and it, in turn, received one-quarter of the commission earned by the structured settlement broker via direct payment, such actions would violate Section 763 of the Illinois Annotated Statutes.

Such a transaction would also be illegal under the same section because of the inducement quality of the transaction:

No company . . . agent or broker shall offer, promise, allow, give . . . , directly or indirectly, any rebate of or part of the premium payable on the policy,^{11/} or on any policy or agent's commission . . . or any other valuable consideration or inducement to or for insurance on any risk

Not only would violation of this statute constitute an illegal rebate,^{12/} but it would also be an unfair method of competition and unfair and deceptive act or practice. ILL. ANN. STAT. ch. 73, § 1031 (Smith-Hurd 1965). Furthermore, Section 1065.40 of the Illinois Annotated Statutes only permits payments of commissions and allowances to duly licensed persons, and the casualty insurer would not be licensed to receive a commission on an annuity contract, notwithstanding the state's anti-rebating laws.

^{10/} We understand that the Illinois anti-rebating law is still being enforced by the Insurance Department.

^{11/} We consider an annuity contract to be subject to this section even though reference is made to insurance policies. The term "policy" is defined to mean an insurance policy or contract. ILL. ANN. STAT. ch. 73, § 614a (Smith-Hurd 1965). Annuity contracts are classified under the definition of life insurance at Section 616(a) of the Illinois Annotated Statutes.

^{12/} Violation of this statute by any company or person shall constitute a misdemeanor and commissions illegally paid or received may be recovered. ILL. ANN. STAT. ch. 73, § 764 (Smith-Hurd 1965 & Supp. 1988).

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C. Connecticut Law

Section 38-59 of the Connecticut insurance statutes prohibits any insurer, agent, sub-agent, or broker from paying or allowing or offering to pay or allow as inducement to insurance any rebate of premium payable on a policy or any special favor or advantage in benefits to accrue thereon, or any valuable consideration or inducement not specified in the policy of insurance.^{11/} Therefore, a direct payment of a commission to the casualty insurer purchasing the annuity contract as an inducement to utilize the services of a particular structured settlement broker would be illegal.^{14/}

Such a transaction would also be prohibited in light of a Connecticut law which prohibits the payment of insurance commissions to any unlicensed person or entity. CONN. GEN. STAT. ANN. § 38-92 (West 1987). The structured settlement broker would be prohibited from paying any commissions to the casualty insurer because it is not licensed as an insurance agent or broker.^{15/}

^{13/} Although an annuity contract is not typically described as a "policy of insurance", Section 38-68t(a) of the Connecticut insurance statutes includes in its definition of "policy", "any policy, contract, certificate, plan or agreement for . . . annuities" Annuity contracts, therefore, should be considered to be subject to the anti-rebating law.

^{14/} The Insurance Department's policy is to continue to enforce vigorously the anti-rebating laws until the Department receives direction from the courts or from the Attorney General that the law is unconstitutional.

^{15/} The Connecticut legislature enacted this statute to protect the public from unlicensed persons who actively engage in servicing, soliciting, negotiating or effecting insurance contracts. Rizzo v. Price, 162 Conn. 504, 294 A.2d 541 (1972). It was also designed to discourage unlicensed persons from placing insurance with licensed agents in return for a commission. 294 A.2d at 544. In this particular case, the casualty insurer would not be entitled to a commission in any event because it has not engaged in activities of servicing, soliciting, negotiating, or effecting insurance; it is merely the purchaser.

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D. Texas Law^{16/}

As is the case of New York, Illinois and Connecticut, it would be impermissible for the casualty insurer to receive a part of the commission paid to the structured settlement broker under Texas law. TEX. INS. CODE ANN. § 21.07-1(3) (Vernon 1981)^{17/} states that "[n]o insurer or licensed life insurance agent doing business in this State shall pay directly or indirectly any commission, or other valuable consideration . . . for services as a life insurance agent . . . unless such person or corporation shall hold a currently valid license to act as a life insurance agent" Acceptance of a commission by an unlicensed person or business entity is also illegal. TEX. INS. CODE ANN. § 21.07-1(3)(b) (Vernon 1981). Texas law would prohibit payment of commissions to a casualty insurer, not only because it is not licensed as a life agent, but also because it did not perform services as a life agent.^{18/}

Likewise, in Texas there is a law which make payments of rebates^{19/} an unfair method of competition and unfair and deceptive act or practice. TEX. INS. CODE ANN. § 21.21(4) (8)(a) (Vernon 1981). It provides that except as otherwise expressly provided by law, it is an unfair method of competition and deceptive trade practice when

^{16/} We are also not licensed to practice law in Texas and we much caution you that our observations contained herein with respect to Texas law are based on our general legal experience.

^{17/} Article 21.07-1 applies to agents for legal reserve life insurance companies. Life insurance agents for other life insurers are bound by Article 21.07(1)(b) which tracks almost verbatim with Article 21.07-1(3)(b).

^{18/} If the casualty insurer is a stock company, it may not be licensed as an agent for any life insurance company. TEX. INS. CODE ANN. § 21.05 (Vernon 1981).

^{19/} Willful violation of 21.07 and 21.07-1 is a misdemeanor with fines and other penalties which may be assessed. Upon conviction, a life agent's license will automatically expire. Violation of Article 21.21 may result in civil penalties, premium refunds, compensatory judgments and other awards.

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knowingly permitting or offering to make or making any contract of life insurance, life annuity . . . or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract . . . or any valuable consideration or inducement whatever not specified in the contract^{20/}

The inescapable conclusion is that payment of a commission by a structured settlement broker to the casualty insurer would violate this statute.

FACTUAL SCENARIO #2a:

The structured settlement broker receives a four percent commission from the life insurer which issued the annuity. The casualty insurer purchasing the annuity has an affiliate or subsidiary agency (hereinafter referred to as "subsidiary agency") either licensed as a life agent which has an appointment from the life insurer issuing the annuity or is a duly licensed life broker. The casualty insurer requests the structured settlement broker to pay the subsidiary agency one-quarter of the commission earned, although the subsidiary agency does not necessarily participate in arranging the annuity purchase. The structured settlement broker shares his commission with the casualty insurer's subsidiary agency. (The subsidiary agency does not have an exclusive arrangement and may be engaged in obtaining annuities independent of the structured settlement broker involved in this case.)

^{20/} We understand that the Texas Insurance Department is actively enforcing its anti-rebating laws. Presently, for example, the Department is disciplining life insurers in the state which are promising that an applicant can receive a student loan in the future if a life insurance product is purchased from the insurer. The Department considers this an illegal rebate just as much as is direct return of a premium to the purchaser because it is an inducement not specified in the life insurance contract.

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A. New York Law

New York law would prohibit the sharing of commission with an affiliate or subsidiary agency^{21/} licensed as a life agent which has an appointment from the life insurer issuing the annuity under certain circumstances. Guidance is provided by an opinion which analyzed a situation where a subsidiary agency acted as the broker^{22/} in the issuance of a group annuity contract.^{23/} The Attorney General was asked to render an opinion on a transaction where a group annuity contract was executed by a life insurance company for another insurance corporation, benefiting the employees of the latter and of its associated companies (all of which were wholly owned subsidiaries). One of the purchaser's subsidiaries was the licensed insurance broker, whose right to commissions was questioned. The Attorney General ruled that the receipt of commissions by a licensed broker which was a wholly owned subsidiary of the purchaser holding an annuity contract would violate the New York law which prohibits rebate of premiums. Op. Att'y. Gen. 217 (1945).

The principle of "direct ownership" was examined in the property/casualty context in Arcim Corp. v. Pink, 253 A.D. 428, 2 N.Y.S.2d 709 (1938). Trustees, in their individual capacities, owned all of the stock of a corporation licensed as an insurance broker. The court held that the corporation could not lawfully receive commissions for acting as a broker in procuring fire insurance policies for the trustees because through the "circuitous route of their corporation," the named insureds would be receiving insurance at a reduced rate, i.e., an indirect rebate.

21/ Pursuant to Section 1601 of the New York Insurance Law, a casualty insurer may invest in a subsidiary acting as an insurance agent for its parent.

22/ The term "broker" is used informally in this opinion, as one cannot obtain a life broker's license in New York.

23/ We realize that this factual scenario does not involve the subsidiary agency acting as the structured settlement broker, but the opinion is noteworthy with respect to the receipt of commissions by a subsidiary agency and it is the most recent Attorney General opinion to address this issue.

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The Arcim decision as well as the Attorney General opinion indicate that if the purchaser of an insurance product directly or indirectly benefits monetarily from using the services of an insurance agent, such transaction will be considered an illegal rebate under New York law. In these cases, the commissions paid to a subsidiary agency or to a business corporation owned by the purchaser resulted in the purchaser receiving insurance at a reduced rate, albeit indirectly. In this factual scenario, the sharing of the commission with the subsidiary agency would benefit the casualty insurer, similar to the facts reviewed in the Attorney General opinion.

Although the 1945 Attorney General opinion is the latest pronouncement on this issue by a New York Attorney General, the Department's policy is to temper the decision by a reading of Section 2103(i) of the New York Insurance Law. This provision permits the Superintendent to require an applicant for a life insurance agent's license to disclose the ownership of the applicant, and state whether the applicant will by reason of securing a license receive any benefit or advantage in violation of the state's anti-rebating law, Section 2324. Further, it empowers the Superintendent to refuse to issue, suspend or revoke a license if there is a finding that the applicant has been or will be receiving any benefit or advantage in violation of the anti-rebating laws. Additionally, the Superintendent may refuse to issue, suspend or revoke a license if he finds that more than 10% of the aggregate net commissions received by the applicant during the twelve month period preceding the application or to be received during the ensuing twelve months resulted or will result in insurance on the property and risks of the applicant's shareholders (or affiliated corporations) owning more than 50% of the shares of the applicant corporation.^{24/} N.Y. INS. LAW § 2103(i)(1)(C) (McKinney 1985).

In this case, the life insurance agency is a wholly owned subsidiary of the casualty insurer. If the subsidiary agency has received in the previous twelve months or will receive in the ensuing twelve months more than 10% of its aggregate net commissions on risks of the casualty insurer, its license may be revoked or suspended.

^{24/} The 10% rule may also be applied in individual and partnership contexts, whereby analysis of certain relationships is set forth (as opposed to corporate control). See N.Y. INS. LAW § 2103(i)(1)(A) through (C) (McKinney 1985).

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We note that normally a life agent may pay a commission to another life agent of the insurer issuing the annuity contract for services in obtaining a new annuity contract. N.Y. INS. LAW § 2114(a)(1) and (2) (McKinney 1985). In this scenario, if the subsidiary agency does not provide any services in obtaining the annuity contract, it may not receive commissions pursuant to Section 2114. Yet, if services were provided by the subsidiary agency, the Department may not consider sharing of commissions as violating the anti-rebating law as long as not more than 10% of the aggregate net commissions received by the subsidiary agency resulted from risks of the casualty insurer during any twelve month period. Wherefore, the answer to this factual scenario turns upon whether the subsidiary agency provides services in obtaining an annuity contract and the amount of commissions it would receive from such activities during a twelve-month period where the casualty insurer is the purchaser of the annuity contracts.^{25/}

B. Illinois Law

Illinois law explicitly sets forth the persons or entities to whom insurance commissions may be paid. Commissions may be paid 1) by a company to its duly licensed agent or broker; 2) by an agent to his duly licensed solicitor or to a licensed agent for the same company acting under his supervision, or to a duly licensed broker; or 3) by a broker to his duly licensed solicitor or to a duly licensed broker for or on account of solicitation, negotiation, or effecting insurance policies or contracts. ILL. ANN. STAT. ch. 73, § 1065.40.

^{25/} We are aware of a practice in the industry of property & casualty insurers purchasing annuity contracts from a sister life company. See, e.g., Winslow, "All in the Family: Affiliated Life Insurance & Property-Casualty Companies Attempting In-House Structured Settlement Programs," Best's Review (Prop./Cas. Edition) (May 1988) at 90; Hindert et. al. § 4.01[1] at 4-3 "a primary insurer may wish to settle a case through the purchase of an annuity from its affiliated, or 'captive' life insurance company."

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Under Section 1065.40, the structured settlement broker could pay a part of his commission to the subsidiary agency^{26/} (if it is acting as a life agent) only if that subsidiary agency was acting under his supervision, for or on account of solicitation, negotiation, or effecting the annuity contract. If the subsidiary agency is a licensed life broker and the structured settlement broker is either a licensed agent or broker, commission sharing would be legal if payment was on account of solicitation, negotiation, or effecting the annuity contract. If the subsidiary agency were not involved except as to act as a conduit into which to receive commissions, the commission sharing would not technically be protected by Section 1065.40.

Assuming sharing of a commission is legal under Section 1065.40 between agents, there is still the juxtaposition of this section with Section 763 which prohibits rebating. There is some indication in Chatz v. Bloom, 322 Ill. App. 435, 54 N.E.2d 889 (1944), aff'd, 329 Ill. App. 180, 67 N.E.2d 621 (1946) that if splitting of commissions is legal, there can be no finding of an unlawful rebate. In Chatz v. Bloom, there was an agreement by an insurance agent that he would rebate to the insured one-half of the commissions on policies issued to the insured. When the insurance agent was declared bankrupt, the trustee in bankruptcy brought an action to recover unlawful rebates of insurance commissions. The defendant argued that an insurance agent's certificate had been made by him, and he stated the transaction was not a rebate, but the sharing of commissions between two parties licensed to receive it. The court determined that the defendant had not proved by a preponderance of the evidence the affirmative defense that the transaction was legal commission-sharing.

The Department appears to have adopted a "common sense approach" in making a determination if sharing of commissions between agents may constitute an illegal rebate. If an agent (who is a subsidiary agency of the purchaser) receives commissions from another agent and no services have been provided to justify the commission payment, the Department is much more likely to view the arrangement as an illegal rebate than if the agent is being compensated for some administrative services which were rendered. The same conclusion would apply

^{26/} There are no prohibitions in the Illinois Annotated Statutes against a casualty insurer being the sole owner of a subsidiary agency.

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to life brokers.^{27/} If the subsidiary agency provides some services in negotiating, soliciting or effecting the placement of an annuity contract, the Department may not view the subsidiary's receipt of a part of the commissions from the structured settlement broker as an illegal rebate.^{28/}

27/ Section 1065.55 requires that an agent or broker must be "actively engaged" in the insurance business. This is defined to mean that the licensed agent or broker must write at least two times the premium volume for others as is written on risks during the preceding year or will be written in the current year for the agent/broker or his employer, or officers and directors of a corporation, if the agent/broker is a corporation. It would appear that this requirement would not affect our conclusions in this scenario because, in most cases, the structured settlement broker is writing the business and even if the subsidiary agency writes the business for the casualty insurer, it is not being written for the agent/broker itself or officers and directors of the casualty insurer. The subsidiary agency has no employer. ILL. ANN. STAT. ch. 73, § 1065.55. Yet, since the license may be used solely for an affiliated casualty insurer, the Department may have some basis for denying or revoking a license used in this manner.

28/ Irrespective of Section 1065.40, there is some indication that Illinois law may treat sharing of commissions with a subsidiary agency differently from the ordinary life agent situation. The situation was discussed in a property/casualty context in Kerrigan v. Unity Sav. Ass'n, 11 Ill. App. 3d 766, 297 N.E.2d 699 (1973), where a savings and loan association formed a subsidiary corporation to sell fire and casualty insurance policies. An argument was presented that any commissions received by the savings and loan association through its subsidiary would be an illegal rebating practice. The court disagreed stating 1) the savings and loan was a corporate entity separate and distinct from its subsidiary; 2) insurance policies were issued to cover the risks of mortgagors, not the savings and loan; and 3) when the insurance commission was earned, the mortgagee would only have a lien on the land to secure payment of the debt. Wherefore, the insurance sold was "with others" and not truly with the savings and loan association. In contrast to the Kerrigan facts, an argument could be made that receipt of commissions by a subsidiary agency where the annuity contracts are issued to its parent corporation is an illegal rebate. Although the casualty insurer is a corporate entity separate and distinct from its

(Footnote continued on next page)

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An analysis of whether "services" have been provided is crucial in determining the lawfulness of this scenario. Clearly, passive receipt of commissions makes the agent's or broker's involvement more likely to gain departmental scrutiny. With respect to commission-sharing between agents, additionally, an analysis must be made to determine whether the subsidiary agency is acting under the supervision of the structured settlement broker. Although it is our opinion that it is unlikely that the structured settlement broker will be operating this closely with the subsidiary agency, facts in individual cases may prove otherwise.

C. Connecticut Law

Connecticut law permits an insurance agent to share his commission with another licensed agent who brought to him the insurance business, "provided such insurance business shall be of such character as such other licensed agent is accustomed to transact for an insurance company for which he is licensed to act as agent." CONN. INS. STAT. ANN. § 38-75. In other words, an agent may share his commission with another agent who has been instrumental in bringing the customer to the agent, even though the latter is an agent for another company. This scenario would be permissible if the subsidiary agency,^{22/} whether an agent for the company issuing the annuity contract or not, brought the annuity business to the agent who has arranged for the issuance of the annuity. If, however, the subsidiary agency is merely a passive instrumentality, the sharing of commission would not be permitted because it has not brought the business to the structured settlement broker.

Moreover, "[n]o insurance agent or broker shall have any right to compensation, other than commissions . . . for or on account of the negotiation or procurement of, or other

(Footnote continued from previous page)
subsidiary agency, in contrast to the Kerrigan facts, the annuity contracts purchased would cover the casualty insurer's contractual obligation under the structured settlement agreement and the commission would be the property of the subsidiary agency.

^{29/} Connecticut law permits domestic insurance companies to own the shares of other insurance corporations, as long as no insurance corporation conducts its business with the public "in a manner which substantially lessens competition or tends to create a monopoly." CONN. GEN. STAT. ANN. § 38-37.

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services in connection with, any contract of insurance . . . unless such right to compensation is based upon a written memorandum" CONN. GEN. STAT. ANN. § 38-75a (West 1987). This section requires the element of providing services in return for commissions or other negotiated compensation, which is also contemplated by Section 38-75. A passive subsidiary agency would not qualify to receive a commission. If the subsidiary agency is a broker, the structured settlement broker could, on the authority of Section 38-92, pay a commission for services rendered by the subsidiary agency.

In this scenario, it would be lawful for the structured settlement broker to share his commission with the subsidiary agency (as a licensed agent) only if it brought the annuity business to the structured settlement broker. If the subsidiary agency, on the other hand, is a licensed life broker, then commissions may be shared for services rendered, such as negotiation or procurement of the annuity contract.

Assuming that the subsidiary agency would be entitled to a commission above, the lawfulness of the commission-sharing is tempered by a reading of the laws regulating granting of licenses and the anti-rebating laws. The Department would certainly find the scenario illegal if the subsidiary agency rebated the commissions back directly to the casualty insurer.^{30/} If, however, the subsidiary agency retained the commissions, the Department analysis would focus upon whether the subsidiary agency was properly licensed to receive a commission. If it were properly licensed, the transaction probably would not be questioned, although each case would have to be reviewed separately. The Department has taken the position, however, find the transaction may be illegal, notwithstanding the legal commission-sharing, if the subsidiary agency was receiving over 10% of its commissions for business directly benefiting the subsidiary agency.

Section 38-72(d) of the Connecticut Insurance Code gives the Superintendent authority to deny an agent's or broker's license application if the license is intended to be used principally for the purpose of obtaining commissions for the applicant's benefit and not for the benefit of the general public. There is a conclusive presumption that the license is

^{30/} The Department takes the position that there would not be a direct rebate to the casualty insurer if it received dividends from the subsidiary agency because a dividend could not be construed to be a commission.

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intended to be used or is being used principally for the applicant if the premiums on policies or bonds intended to be written, or written, by any such applicant for the general public do not exceed nine times the premiums on policies or bonds intended to be written, or written, by him "for the purpose of obtaining commissions on premiums paid or to be paid by him, his spouse, his employer and any corporation of which he has stock control or of which the stock control is held by any combination of himself, his spouse and his employer." CONN. GEN. STAT. ANN. § 38-72(d). Read strictly, the presumption test in this statute does not appear to apply to this scenario because the premiums paid for annuity contracts are not paid by the subsidiary agency itself, and the casualty insurer which wholly owns the subsidiary agency is not stock control which is a combination of the "applicant, his spouse, and his employer." However, since in this scenario the agent's license may not be used "for the benefit of the general public", but solely for an affiliated casualty insurer, Section 38-72(d) may give the Superintendent a basis for denying or revoking a license used in that manner. In fact, the Department's policy is to interpret and apply this provision liberally to determine whether the license will be or is being used "for the benefit of the general public."

D. Texas Law

Articles 21.07 and 21.07-1 would permit the sharing of commissions between life insurance agents for services rendered. Receipt of commissions without providing services, however, would not be allowed.

However, in Texas no corporation may own any interest in a corporation licensed as a life agent unless the owning corporation is also licensed as a life agent. TEX. INS. CODE ANN. §§ 21.07(2) and 21.07-1(4). The Department's position is that a corporate casualty insurer may not own an interest in a corporation licensed as a life agent.

FACTUAL SCENARIO #2b:

The same facts apply as set forth in #2a, but the subsidiary agency does not have an appointment from the life insurer which issued the annuity.

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DISCUSSION

A. New York Law

Section 2114(a)(2) would prohibit the payment of a commission from the agent of the life insurer issuing the annuity contract to the subsidiary agency because it does not have an appointment from the contract-issuing life insurer. Because there is no appointment, an analysis of whether "services" were rendered is of no consequence.

B. Illinois Law

Section 1065.40 of the Illinois Annotated Statutes would prohibit an agent from sharing a commission with another agent unless both agents were appointed by the same company. If, however, the structured settlement broker shares his commission with another licensed broker,^{31/} for or on account of solicitation, negotiation, or effecting of the annuity contract, this factual scenario would be lawful in light of Section 1065.40; provision of services, however, would have to be demonstrated by the subsidiary agency.

What is lawful under Section 1065.40, however, must be analyzed in conjunction with the state's anti-rebating laws. Our conclusion from Factual Scenario # 2a remains the same, regardless of the appointment issue, with respect to brokers. Payment to a subsidiary agency may be a technical violation of the anti-rebating laws, but the Department is unlikely to enforce the laws unless the subsidiary agency provides no services and receives a commission.

C. Connecticut Law

As discussed above, Section 38-75 would permit a structured settlement broker to share his commission with another life agent (i.e., the subsidiary agency) even though it is not appointed by the company issuing the annuity. The issue of appointment would not be relevant if the subsidiary agency was a broker. Our conclusion in Factual Scenario #2a remains applicable with respect to the anti-rebating laws.

^{31/} Brokers do not receive company appointments as they operate as agents of insureds, not agents of companies in accepting applications for insurance.

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D. Texas Law

As noted in #2a, a casualty insurer would not be permitted to have an interest in a corporate life agent in the state of Texas.

FACTUAL SCENARIO #3:

The structured settlement broker receives a four percent commission from the life insurer which issued the annuity. The casualty insurer requests the structured settlement broker to pay an independent (non-affiliated) broker one-quarter of the commission earned from the sale of the annuity. The independent broker does not have an appointment from the life insurer which issued the annuity. The structured settlement broker shares his commission with the independent broker.

A. New York Law

Our opinion with regard to the Factual Scenario in #2b equally extends to this situation. New York would require the independent agency to have an appointment from the life insurer issuing the annuity contract.

B. Illinois Law

As noted earlier, Section 1065.40 sets forth to whom a commission may be paid. It would not permit two agents to share a commission unless they were appointed by the same life insurance company. Therefore, the structured settlement broker would not be permitted to share a commission with the independent agency which does not have an appointment from the life insurer issuing the annuity contract.

The conclusion may be different if the structured settlement broker, acting as either an agent or broker, shares commissions with an independent agency which is a licensed broker. If the independent agency solicits, negotiates, or effects the annuity contract, it may be compensated via commission. ILL. ANN. STAT. ch. 73, § 1065.40.

Of course, if the casualty insurer directly or indirectly benefits from the payment of commissions to the independent broker, there may technically be an illegal rebate. It appears the Department has not applied the law this far, however, to find a rebating situation.

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C. Connecticut Law

The discussion above in Factual Scenario #2 applies with regard to sharing commissions between agents and brokers and services rendered. Considering the Department's stance on sharing commissions with a subsidiary agency of the purchaser, it is even more likely that the Department would not challenge this scenario because the contact between the purchaser and the independent agency is even more remote. As long as the requisites for lawful commission-sharing are satisfied, this scenario would likely be unchallenged in Connecticut.

D. Texas Law

There is no requirement that agents sharing commissions be appointed by the same life insurer. If payment to an independent agency directly or indirectly benefits the casualty insurer purchasing the annuity contract, there may be a violation of the state's anti-rebating laws. The Texas Insurance Department has indicated that it would probably not challenge such a scenario as this one because it could present a constitutional challenge. There would be no tangible link between the purchaser and agent receiving commissions, and it is unlikely the Department would be willing to stretch the concept of an "indirect rebate" this far.

We trust the foregoing has been responsive to your request. If you have any further concerns or questions, please feel free to contact me or Charles W. Havens.

Very truly yours,


L. Charles Landgraf

LEBOEUF, LAMB, LEIBY & MACRAE

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1333 NEW HAMPSHIRE AVENUE, N.W.

WASHINGTON, DC 20036

202-457-7500

TELEX: 440274 FACSIMILE: 202-775-4163

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SETTLEMENT BROKERSExecutive Summary

The anti-rebating statutes in the four States examined, New York, Illinois, Connecticut and Texas, do appear to apply to structured settlement annuity purchases made in those States. Whether the practice of commission-sharing is prohibited by these statutes, however, varies from State to State and depends on the facts of the transaction. Three basic scenarios were analyzed under the laws of each of the four States.

Generally speaking, commission-sharing is permissible between agents if the agents are properly licensed and the commission is paid for services actually rendered by each. This seems to preclude, by definition, the payment of a commission directly to a casualty insurer purchasing an annuity contract because it is not licensed as a life agent. And, in fact, a subsidiary of the purchaser which is a licensed life agent or broker may not always be permitted to receive a commission for several reasons: 1) some States require that agents sharing a commission be appointed by the same life insurer issuing the annuity contract; 2) some States demand the agent to write a certain amount of business on risks of other than those of the agent or those affiliated with the agent; 3) some anti-rebating laws may view this arrangement as directly benefitting the purchaser whereby it is receiving the product for a reduced cost; and 4) passive receipt of commissions without performing actual services is not permitted in many States.

There is a tension between the licensing/commission-sharing statutes, which permit sharing, and the anti-rebating statutes, which would prohibit sharing, where the payment amounts to a direct or indirect rebate to the purchaser. There

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has been little State enforcement of anti-rebating laws. The failure of many insurance departments to apply the anti-rebating laws to "indirect" rebates, however, may be due more to the subtlety of the transaction and the lack of specific guidance from the courts or State attorneys general on what constitutes an "indirect" rebate, than to any conscious policy to permit the practice.

A program to alert State regulators to the practice could be devised that would result in greater scrutiny of those practices that appear to contravene statutes. However, any such collective activity by private industry to stimulate enforcement of these anti-rebating laws raises a number of sensitive issues, not addressed in our memorandum, and we would welcome the opportunity to discuss these with your group. Our legal analysis is set forth more fully in the paper.