CANCELLATION OF BROKER CONTRACTS WHERE THE BOOK OF BUSINESS INCLUDES ONTARIO AUTOMOBILE INSURANCE POLICIES

THE POTENTIAL PITFALLS

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Many insurers cancel broker contracts from time to time. In many cases the canceled broker's book of business includes both personal and commercial lines automobile insurance written in the Province of Ontario. Many insurers cancel the broker's contract and assume that the broker will place the business with its other markets. They give no further thought to any obligations that they may owe to their insureds, whom they tend to think of as the canceled broker's clients. What many insurers do not realize is that they probably still have an obligation to offer to renew these policies. If they do have such an obligation and fail to comply with it, then the application of subsection 236(5) of the Ontario ***Insurance Act*** ("**OIA**") could result in the insurer continuing to insure such insureds indefinitely. The purpose of this note is to canvass the circumstances in which an obligation to offer to renew a policy arises and to suggest some ways to avoid running afoul of this obligation.

Section 238 of the **OIA** prohibits an insurer from terminating or refusing to issue or renew a policy of automobile insurance except on a ground filed with the Superintendent of Financial Institutions ("Superintendent"). Generally speaking, the Superintendent will not accept, as a ground for refusing to issue or renew a policy of automobile insurance under section 238, that the insurer has canceled its contract with the insured's broker. Accordingly, insurers generally have an obligation to offer to renew policies even after they have canceled the broker's contract. This provision applies to all types of automobile insurance.

Additionally, for non-fleet policies (i.e., policies insuring less than five vehicles which are under common ownership or management), section 236 of the **OIA** provides that an insurer must give notice to its insured of its intention not to renew a policy or to renew it on varied terms. This notice must be given to the insured in writing at least thirty days before the policy expires. Alternatively, this notice can be given to the broker at least forty-five days before the policy expires. The broker is then obliged to give the insured written notice of the insurer's intention at least thirty days before the expiry of the policy. The broker is exempt from this notice requirement if it replaces the policy more than thirty days before it expires. The section 236 notice must set out the insurer's reason for refusing to renew the policy and that reason must be consistent with a ground filed with the Superintendent

under section 238 of the **OIA**.

Any insurer which fails to offer to renew a policy solely because the insured's broker has been canceled will almost certainly find itself in violation of section 238 and possibly section 236 of the **OIA**. Such a violation is an offence under the **OIA**. The fines for breaching the **OIA** can be as high as $100,000.00 for a first offence and up to $200,000.00 for a subsequent offence.

Section 238 of the **OIA** does not specify whether an insurer will be subject to any civil consequences for failing to offer to renew a policy in violation of the section. However, section 236, which applies to all but fleet policies, does impose a fairly draconian civil penalty for failing to comply with that section. Where an insurer has failed to comply with section 236 the policy remains in force until the notice provisions have been complied with. Technically, once the insurer is inside the thirty-day window it is impossible to comply with the notice requirements. However, we suspect that a court would conclude that once the late notice is given, the policy will only remain in force for an additional thirty days. It is quite possible that this provision could be interpreted as keeping the policy in force indefinitely and regardless of whether the insured has paid any additional premium. This is potentially a significant problem. In most cases an insurer, which has failed to comply with section 236, will never realize that it made the error and will never attempt to correct it.

Given these provisions, what are an insurer's obligations to its insureds following the termination of a broker's contract? Strictly, speaking it must offer to renew each policy placed through that broker. It would also have an obligation to ensure that the policy was serviced. Since many broker contracts provide that the book of business belongs to the broker, this presents some practical problems. It may be inconsistent with the broker's contract for the insurer to solicit the business by offering to renew it. Additionally, it will be difficult to find another broker to service the business in such circumstances. If the insurer can find a broker to service the business, then it may be called upon to pay commissions to the new broker and the canceled broker.

What the insurer cannot do is simply assume that the canceled broker will take care of the problem. I would suggest asking the canceled broker to undertake that it will replace all contracts at least forty-five days prior to their lapse. I would further suggest that the insurer attempt to obtain an undertaking from the broker that it will advise the insurer of any contracts it

has not been able to replace at least forty-five days before their lapse. This will provide the insurer with an opportunity to offer to comply with section 236 by providing the appropriate notice. In most cases, these undertakings should be forthcoming as it is in the broker's best interests to place this business in its other markets. If an insurer runs into difficulty in obtaining such an agreement from a broker, then it should inform the broker that it will have no choice but to renew the business and transfer the servicing of the policies to a new broker. This should be a sufficient incentive for the broker to cooperate in the orderly transfer of the business. These undertakings should be confirmed in writing.

In the end, however, it is the insurer which bears the risk of any failure by the broker to comply with such undertakings. If the broker fails to remarket a policy and the insured finds itself in an accident and without coverage, then the insured will look to the insurer for coverage. The above suggestions should reduce the likelihood of this occurring. However, if the broker fails to live up to its undertakings, then the insurer may be able to look to the broker for indemnity for any claim advanced by the insured or by an injured claimant.

I would also recommend that insurers review their brokerage contracts to ensure that the terms of those contracts are consistent with sections 236 and 238 of the **OIA**. Brokerage contracts should specifically require brokers to provide the type of undertaking discussed above. They should also reserve, to the insurer, the right to renew and service policies notwithstanding that the book of business belongs to the broker. If a broker fails to honour an undertaking to remarket a policy, then the broker's contract should provide that the broker is not entitled to any commission with respect to the renewal of that policy.

Sections 236 and 238 of the **OIA** are minefields for the unwary insurer. While it is impossible to avoid all of the potential problems created by these sections, a prudent insurer should be able to avoid many of them.