

1982 WL 189287 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 7, 1982

***1 Re: Cancellation of Designated Agents**

Mr. A. H. Thurstin
Manager
South Carolina Reinsurance Facility
Post Office Box 4383
Columbia, South Carolina 29240

Dear Al:

This will serve to acknowledge your request for our opinion concerning the circumstances and manner in which a designated carrier may cancel or suspend the authority of a designated producer under the Plan and Rules of Operation.

Neither Act 1177 nor the Plan and Rules of Operation of the Facility provide any express method for the cancellation of designated producer contracts. However, designated producers are themselves a creature of the Facility Plan and Rules of Operation and also governed by the contract between the designated carrier and agent. After careful examination of the Facility Plan and Rules of Operations and sample agency contracts used by the designated carriers, we are of the opinion that the designated carrier may cancel or suspend the contractual relationship with a designated producer for any number of valid reasons for which a voluntary agent may be terminated. These reasons would include acts of infidelity by the agent, business practices not in compliance with the carrier's or Facility's guidelines, or other reasons indicating an unwillingness to continue the agency relationship. Additionally, the Commissioner, in our view, would have the authority to 'dedesignate' an agent based upon a finding, in concurrence with the Facility's Board of Governors, that the bases of designation no longer exist. That is to say that the agency designation is no longer needed to assure marketing outlets for insureds in the area or there is no longer any need for the appointment of an involuntary carrier for that agency.

We call your attention to Article II of the Plan of Operation defining 'designated carrier' and 'designated producer'. A designated carrier is an insurer 'who agrees to appoint a designated producer as his agent'. Thus, the continuation of a ?? time and to keep the appropriate records open for inspection at all times to the Insurance Department, Facility and designated carrier. The policing function itself combined with the requirement of a contractual relationship between designated carrier and designated agent clearly supports the authority to cancel the designated agency relationship for valid business reasons. If the activities of the designated agent are such that would normally call for suspension or cancellation of the contractual relationship if that agent were a voluntary as opposed to designated one, in our view the carrier is under an obligation to the Facility under its Plan and Rules of Operations to take appropriate action.

For the designated carrier to do so, acting purely as an agent of the Facility, does not in our opinion violate any provision of Act 1177. Section 38-37-940 is the only provision of Act 1177 relating at all to agency cancellations. In the first place, this Section would be inapplicable since it deals with cancellations or imposition of disadvantages upon an agent because of the type of business the agency writes or the amount of insurance which a company finds necessary to reinsure in the Facility. Since 100 percent of all designated agents' business resides in the Facility, no such violation can be said to occur. Despite the fact that this provision speaks to the only impermissible basis for cancellation, which a fortiori cannot exist in a designated agent situation, we are also of the opinion that the provision was designed to apply only to the termination of voluntary agency relationships. We are lead to this conclusion not only by the language of the statute itself but also to the recent series of South Carolina Supreme Court decisions interpreting it.

*2 In our view, a distinction should be made between the 'designation' of an agent and the contractual relationship between the agent and designated carrier. For example, the Insurance Commissioner designates an agent as a designated producer for one of two permissible reasons. Either the agent was one who was left without a servicing carrier as the result of Act 1177 or the agent was appointed to service a specific area to provide sufficient marketing outlets for automobile insurance. In the event the Commissioner finds after designation that neither of these two bases exist, he may withdraw the designation. Further, the Commissioner may, in the proper manner, undercut a producer's designation by appropriately suspending or revoking the producer's license for a valid reason. These actions, of necessity, would be the sole province of the Commissioner.

Under the Facility rules the Governing Board, or its designate, could also instruct a designated carrier to suspend or terminate its contract with a designated carrier. Such authority is necessarily implied in the powers given to the Governing Board to direct that the contract be entered into in the first place. This action could be taken by the Governing Board as a result of audits or inspection of the producer's records or any other factors indicating that the producer has failed to comply with appropriate business practices recognized by the Facility or ceded business.

Additionally, the carrier, based purely upon the contractual relationship could initiate the action unilaterally to suspend or terminate the agent. In reviewing the contracts approved and utilized by designated carriers, all normal business requirements applicable to voluntary agents must be adhered to by the designated producer. Violations of these standard procedures, as with voluntary contractual relationships, could constitute a breach of the contract by the agent which could call for termination or suspension of the relationship. Additionally, there are any number of circumstances which might also dictate the suspension or termination of a contractual relationship apart from violations of the agreement itself. In reviewing the standard agency contracts utilized by designated carriers, we find generally a provision permitting termination by either party at any time upon written notice to the other. Thus, the designated carrier is obligated under its contractual relationship only at will. So long as there is no impermissible basis under Section 38-37-940, which we do not believe applies in any event, the carrier may terminate or suspend at will. While we would generally not expect an at will termination, we do recognize a number of circumstances which might call for such action. For example, a designated carrier may not wish to continue or even enter into an involuntary contractual relationship with an agent that was previously one of its voluntary agents and sought designation only after cancellation of the voluntary contract. Further, a dispute may exist between the designated agent and designated carrier which has resulted in litigation on some matter apart from the contract itself. Under such circumstances, the designated agent and carrier may wish to avoid any contractual relationship during and even after the dispute. In such a case, cancellation of the contract would not necessarily result in 'de-designation' of the agent. The agent should be able to retain its originally designated status and apply to the Facility for reappointment to a different designated carrier. If, however, the Governing Board or Commissioner feels that the reasons for cancellation also constitute valid reasons for de-designation, appropriate action may then be taken to accomplish this.

*3 In summary, it is our view that termination or suspension of the contractual relationship may be initiated by either the Commissioner, the Governing Board or the designated carrier. In the event the carrier chooses to initiate the action, we think every effort should be made to notify both the Commissioner and Facility. We view this as part of the policing function imposed upon the carrier. Additionally, the designated carrier may wish to take measures short of complete termination pending concurrence or direction by the Facility or Commissioner such as suspension of the agreement or its limitation to the servicing of renewal business only. It would also be our recommendation to the designated carrier that every effort be made to obtain the concurrence of both Facility and Commissioner prior to actual termination. If, however, the actions causing the initiation of termination of the agreement stem from acts of infidelity or dishonesty the termination may be appropriate with all parties being immediately advised of the carrier's actions.

Such authority is necessarily implied in the contractual nature of the relationship between carrier and agent as well as in the mandate under the Facility Plan and Rules of Operation for the carrier to police and enforce standards on designated agents comparable to those standards applied to its voluntary agents.

We trust that the above adequately provides you with our opinion as to the manner and bases for termination or suspension of the designated agents' authority to act under contracts from designated carriers. If you have any further questions or require additional explanation of any matters stated herein, please contact me at your earliest convenience.

With kind personal regards, we are

Yours very truly,

Thomas C. Salane

Turner, Padget, Graham & Laney, P. A.

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