INSURANCE: Sec. 379.350 RSMo 1949 prohibiting rebating is
BROKERS: applicable to insurance brokers licensed under Sec. 375.270 RSMo 1949, and penalty provisions of Sec. 379.410 RSMo 1949 are applicable.

FILED
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December 31, 1954

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Garnholz:

This formal opinion is in reply to your original request which posed the two following questions:

> (a) "Do Sections 379.350 and 379.410 Missouri Revised Statutes (1949) operate to prohibit an individual insurance broker (not a corporation), duly licensed pursuant to Section 375.270 Missouri Revised Statutes (1949), from sharing his commissions with the customer whom he represents and for whom he obtains insurance?
>
> (b) "Does an individual insurance broker (not a corporation) so acting fall within the purview of the penalty provisions of Section 379.410 Missouri Revised Statutes (1949)?"

Subsequent to the date of your original request for this opinion you submitted additional facts bearing on your fact situation, and we quote such facts as found in your letter of October 15, 1954:

> "In reply to your letter of October 7, 1954, requesting further information in order to enable you to fully reply to my inquiry of September 28, 1954, the following facts are put forth for your consideration.

"The insurance broker operates under an oral contract whereby his customer states to him that he is willing to pay a certain amount for the type of insurance requested by him. The broker thereupon goes to various general insurance agencies and places the insurance. The general insurance agency then bills the broker for the net premium and any and all amounts collected in excess of that amount the broker retains as his commission.

"To hypothesize an example:

"A customer requests the broker to cover him with automobile insurance and then asks what the premium is. The broker tells him '$200.00', whereupon the customer, claiming to be able to obtain the same coverage for a lesser amount, informs the broker that he will pay only the amount of $180.00 and that the broker is authorized to cover him based upon that agreement. The insurance broker thereupon places the insurance through a general insurance agency which said agency bills the broker only the amount of $150.00, representing the net cost of the insurance. According to the general insurance agency, the broker is authorized to collect up to the $200.00, but in pursuance to this oral contract with his customer, the broker collects the sum of only $180.00.

"The question which is posed pursuant to my letter of September 28, 1954, concerns that $20.00 differential representing the amount the broker could have collected had he not shared that with the customer whom he represents. * * *"

Section 375.270 RSMo 1949, on its face, seems to contain a definition of the term "insurance broker", and the full section is quoted as follows:

"1. Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for any person other than himself, and not being

> the appointed agent or officer of the company in which such insurance or re-insurance is effected, shall be deemed an insurance broker, and no person shall act as such insurance broker, save as provided in this section.
>
> "2. The superintendent of insurance may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or re-insurance, or place risks, or effecting insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in this state of any foreign insurance company duly admitted to do business in this state.
>
> "3. Such certificate shall remain in force one year, unless revoked by the superintendent of insurance for cause.
>
> "4. Any person who shall act as broker or agent, in negotiating insurance or reinsurance, as above stated, without first having obtained a certificate of authority or broker's license for such purpose, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, to be recovered and applied in the manner prescribed in section 375.310."

Subparagraph 1 of Section 375.270 RSMo 1949, quoted above, was construed in Farber v. American Automobile Insurance Company, 177 S.W. 675, 191 Mo. App. 307, l.c. 321, and the Court referred to the language contained in subparagraph 1 of such statute in the following language:

> "But this is a mere general declaration of the law as to the function of an insurance broker, and does not render him, in every transaction, the agent of the insured, for the facts attending the negotiations determine for whom he is acting. Notwithstanding the

> statute, a broker may become the agent of the insurer because of some special condition or circumstance attending the particular case."

Having disposed of Section 375.270 RSMo 1949 as a statute of rigid definition when applied to the term "insurance broker", we next look to subparagraph 2 of the statute to determine the scope of authority of the superintendent of the division of insurance when he refuses to issue or seeks to revoke a broker's license. Treatment of this subject is prefaced by stating that Departmental Order No. 40, dated December 15, 1951, issued by the Superintendent of the Division of Insurance of Missouri, and addressed to "all agents and brokers" sets forth grounds for revoking, or refusing to issue, licenses to agents and brokers. Such departmental order specifically mentions "(7) Rebating", and "(8) Misrepresentation" as grounds for revoking or refusing to issue an agent's or broker's license.

In the case of State ex rel. Mackey v. Hyde, 286 S.W. 363, 315 Mo. 681, the Supreme Court of Missouri had under review Section 375.270 RSMo 1949, cited above. At 315 Mo. 681, l.c. 691, 692, the Court spoke as follows concerning an insurance broker:

> "There is one individual engaged in effecting insurance, however, who is neither an insurer nor the appointed agent of an insurer, and whose activities are by no means an open book. This individual is the insurance broker, and unless he were somehow brought within the scheme of regulation it would not be complete. * * * If brokers' licenses may be made use of to defeat the non-discriminatory provisions of the rate statute, as stands admitted on the pleadings, then in order that those provisions may not become a dead letter it is necessary that some discretion be exercised in the issuance of such licenses."

Rebates and special rates are specifically forbidden by Section 379.350 RSMo 1949, in the following language:

> "No company or other insurer or agents shall directly or indirectly, by any special rate, tariff, drawback, rebate, concession, device or subterfuge, charge, demand, collect or receive from any person, persons or corporation any compensation and premium different

> from the rate or premium properly applicable to the property so rated, as indicated by its public rating record, and no company or other insurer shall discriminate unfairly between risks of essentially the same hazard and substantially the same degree of protection."

The word "agents" used in Section 379.350 supra, must be presumed to refer to agents of the insurer rather than to "brokers", since the statute deals with acts touching the charging and collection of premiums which represent the cost of insurance to the insured, and in Farber v. American Automobile Insurance Co., supra, the Court spoke as follows at 191 Mo. App. l.c. 324:

> "This court has heretofore declared that a mere insurance broker, as such, is without authority to receive a premium from an applicant for insurance."

The premium charged for a policy of fire insurance reflects the cost of coverage to the insured as shown by the company's public rating record, and if a broker undertakes to change such cost of insurance to the insured by accepting a premium less than called for by the company's public rating record, he certainly effects a discrimination between the person with whom he is dealing and other insureds who must pay the premium established by the public rating record. At the same time such broker has actually misrepresented to the insured the true cost of the insurance. These acts on the part of the broker, together with any acts of his in connection with collecting the premium and remitting the same to the company through an authorized agency of the company remove him from his status of agent solely for the insured in placing the insurance, and he becomes an agent for the company taking the risk or its authorized agent who ratifies his acts.

In view of the considerations outlined above, as applied to the facts you have submitted it must be reasonably concluded that a broker sharing his commission, received from the authorized agency, with the insured in order to lessen the cost of the insurance as reflected in the company's public rating record is to be comprehended within the term "agents" as used in Section 379.350 RSMo 1949, which statute prohibits rebating. Having so concluded, it necessarily follows that the general penalty statute, Section 379.410 RSMo 1949, will apply to such broker.

Honorable Edward W. Garnholz

CONCLUSION

It is the opinion of this office that Section 379.350 RSMo 1949, prohibiting rebating is applicable to an insurance broker licensed under Section 375.270 RSMo 1949, and such broker comes within the purview of the penalty provisions of Section 379.410 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

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