

[COVER]

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# CANCELLATION FOR NON PAYMENT:

*New Developments  
Affect Agents and Brokers*

**UPDATE**  
**INSURANCE  
LAW § 3426**

*What are the obligations and duties of an insurer, insurance broker or agent with respect to notices of cancellation for nonpayment of premium? New York Insurance Law § 3426 governs the cancellation of commercial lines insurance policies, and provides for instances where an insurer has a statutory right of cancellation, such as the nonpayment of premium.*

Specifically, Insurance Law § 3426(c)(1)(d) provides:

(c) After a covered policy has been in effect for sixty days unless canceled pursuant to subsection (b) of this section, or on or after the effective date if such policy is a renewal, *no notice of cancellation shall become effective until fifteen days after written notice is mailed or delivered* to the first-named insured and to such insured's authorized agent or broker, and such cancellation is based on one or more of the following:

(1) With respect to covered policies:

(A) *nonpayment of premium* provided, however, that a notice of cancellation on this ground shall inform the insured of the amount due.

(emphasis added).

**What exactly does “nonpayment of premium” mean?** The relevant statute, Section 3246(a)(3) of the Insurance Law, defines “nonpayment of premium” as: the failure of the named insured to discharge any obligation in connection with the payment of premiums on a policy of insurance or any installment of such premium, whether the premium is payable directly to the

insurer or its agent. Payment to the insurer, or to an agent or broker or authorized to receive such payment, shall be timely for the purpose of this section if made within fifteen days after the mailing to the insured of a notice of cancellation for nonpayment of premium.

(Emphasis added).

Under Section 3426's 15-day grace period, if the insured makes payment within 15 days after the mailing of the notice of cancellation, the insurance agent authorized to receive such payment must accept the payment and the policy must be continued.

The Department has made clear that payment is considered “made” as of the postmarked date. For instance, in Office of General Counsel Opinion (Jan. 17, 2003), the Department concluded that “the premium paid by the insured to continue the policy after receipt of a notice of cancellation for nonpayment of the premium is considered paid as of the postmark date unless the cancellation notice specifies otherwise.” In other words, if the notice of cancellation for nonpayment of premium provides that premium payment is deemed made when the insurer receives it, actual receipt by the insurer is required. If the notice of cancellation does not so specify, then, in accordance with the “Postal Acceptance Rule,” the acceptance of the offer is complete and the policy or contract becomes binding upon both parties when the insured deposits the acceptance by the payment of premium in the post office. *See, e.g., Government Employees Ins. Co. v. Solaman*, 157 Misc.2d 737 (Sup. Ct. Nassau Co. 1993).

It is also explicitly stated in the statute (as amended in 2003), that a notice of cancellation for non-payment of premium must specify the amount due. Thus, an insurer that, pursuant to New York Insurance Law § 3426(c)(1)(d), cancels a commercial risk insurance policy must both cite to that statute and specify the reasons for cancellation. In fact, Insurance Law § 3426(h) provides that: “(h) Every notice of cancellation issued pursuant to this section shall specify the grounds for cancellation and shall contain where applicable a reference to the pertinent

paragraph or subparagraph of subsection (c) of this section.”

Indeed, courts have recognized that with respect to a notice of cancellation of an insurance policy, “[l]iteral compliance with the provisions of the [applicable] statutes is the rule and any ambiguity in language is strictly construed against the insurer.” *See Sweeny v. Preferred Mutual Ins. Co.*, 43 A.D.3d 1395 (4th Dep't 2007) (citations omitted) (affirming plaintiff's motion for partial summary judgment where defendant-insurer failed to refer to Insurance Law Section 3426(c)(1)(A) in its notice canceling plaintiff's insurance policy for nonpayment of premiums).

**What if a cancellation notice does not state the amount due on the face of the notice but refers the insured to a premium statement which states the amount due and is attached to the notice?** According to the Department, such a facially defective notice is invalid. *See OGC Op. No. 06-01-12* (Jan. 6, 2006). The Department reiterated the legislative history of the notice provisions and emphasized that cancellation notices and the statutes must be literally complied with in order to advance the Legislature's intent – to prevent cancellation of the policy.

Assuming a cancellation notice is facially proper, **what happens when an insurer sends a notice of cancellation for nonpayment of premium and the insured remits premium payment, but not the late payment fee, within the 15-day grace period?** In Office of General Counsel Opinion No. 02-01-05 (Jan. 4, 2002) and Office of General Counsel Opinion No. 03-04-31 (Apr. 29, 2003), the Department opined that an insurer may cancel a policy for nonpayment of the late payment fee *only if* the insurer explicitly provides in the notice of cancellation that the policy is being canceled due to nonpayment of the premium and the late payment fee. The Department has explained that if an insurer sends a billing statement that provides for the charge of a late payment fee if the premium is not paid by the due date and the insured fails to timely make payment, the insurer may then send a notice of cancellation that states that the policy will be canceled for nonpayment of premium and

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the late payment fee if both are not received by the date specified in the notice. See OGC Op. No. 03-04-31. Under these circumstances, if the insurer then remits payment of the premium but not the late payment fee, the insurer may cancel the policy for nonpayment of the late fee.

In that same opinion, the Department also addressed the issue of an insured that fails to make payment within the 15-day grace period, but offers to submit payment before the cancellation date. Suppose, for example, the Department's hypothetical that the premium is due December 1, for a policy that renews on January 1. The insured does not pay on December 1, and the insurer sends notice of cancellation for nonpayment of premium with the cancellation to be effective January 1. The 15-day grace period elapses, and the insured subsequently pays, before the renewal date. The Department concluded that the insurer is not required to accept such payment because it is proffered after the 15-day grace period.

This suggests that so long as an insurer, or agent or broker complies with Section 3426's notice requirements, its obligations to an insured for the policy that is the subject of the cancellation notice should terminate upon expiration of the 15-day grace period. While this may be true to a certain extent, the specific facts may lead a court or the Office of General Counsel to reach a different result.

For instance, **what obligation, if any, does a broker, or agent or insurer have to an insured who makes a partial payment of premium, after notice of cancellation for nonpayment of premium has been sent?** The Department has addressed this under Section 3425 in considering an issue of partial payment of a homeowner's and automobile insurance policy. (OGC Op. No. 00-08-08 Aug. 10, 2000). Under the facts of that opinion, the broker had

authority to accept the insured's premium payment for renewal of a policy and sent a notice of cancellation to the insured for nonpayment of premium. The insured then made a partial payment to the broker but the broker did not reinstate the policy because the partial payment was insufficient. While the Department recognized that "partial payment is not payment sufficient to reinstate the policy" the Department pointed out that "there is time to remedy the situation if the payment is made within the 15 day grace period." The Department succinctly explained, "the broker, although acting on behalf of the insurer for acceptance of the money, nevertheless owes a duty to the insured to warn the insured that insufficient payment is regarded as no payment for renewal purposes. The insured should be so notified by the broker." It is likely that the same reasoning would apply to a commercial lines insurance policy under Section 3426.

**What happens when an insured makes payment to the broker but the broker neglects to transmit the payment to the insurer?** Most recently, on January 13, 2009, the Department addressed the issue of whether an insurer is required to rescind a notice of cancellation for nonpayment of premium when the broker that procured the policy collected the premium from the insured but failed to remit the premium to the insurer. See OGC Op. No. 09-01-03. The Department explained that under the circumstances, the insurer must rescind the cancellation if the insured has not already procured insurance elsewhere because payment to the broker is deemed payment to the insurer.

Against this backdrop, we can understand a recent decision issued by the New York Appellate Division, First Department, in *6085 Strickland Assoc., LLC v. The Whitmore Group, Ltd.*, 2009 WL 749385, at \*1 (1st Dep't Mar. 24, 2009). The case involved a broker's alleged negligent failure to procure insurance where a policy had

been canceled for nonpayment of premium. The Court considered Section 3426's 15 day grace period and ruled that "there could be no breach by defendants of any duty to keep [the policy] in effect". In ruling in favor of the broker that no issue of fact existed, the court found it significant that the insured never requested that the broker renew or reinstate the policy or procure replacement coverage. Since the insured had received a notice of cancellation but had failed to remit payment of the premium within the fifteen day grace period, the broker had no duty with respect to the insured for the cancellation of that policy.

Although not explicitly stated, *6085 Strickland Assoc.* suggests that a broker may have a duty, notwithstanding a validly issued cancellation notice, if an insured requests replacement coverage before the 15 day grace period has expired.

In sum, insurers, agents and brokers must be careful when issuing a notice of cancellation for nonpayment of premium and state the amount due on the face of the notice, in order for a cancellation to be valid and effective. Upon mailing of the notice, the 15 day grace period is triggered and if the insured makes payment within 15 days of the post-marked date, the insurer, agent or broker authorized to receive such payment, must accept the payment and continue the policy. If the 15 day grace period has elapsed and the insured has failed to remit the premium due, an insurer or agent or broker may have no further duty with respect to the insured as to that canceled policy. Be wary, however, where partial payment is made within the grace period, or where an insured requests replacement coverage before the 15 days have expired. [A]

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