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Tis the Season...
**GIFTS, KEEPSAKES
AND REBATES**

A legal look at your shows of appreciation.

Inside:

**Cuomo Targets
Exec. Pay...
HE MEANS IT!**



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Insurance Law § 2324(a), entitled “Rebating and discrimination” which applies to property and casualty insurance, prohibits an insurer, agent or broker from giving anything of value to a client or

dends or other benefit to accrue thereon, or shall give or offer to give any valuable consideration or inducement of any kind, directly or indirectly, which is

card would constitute an unlawful rebate not specified in the insurance policy of those current insureds. Further, “a ten dollar gift card does not qualify as a keepsake—even if the insurer’s or producer’s name is

As the holiday season approaches, you may be thinking of gifts to send to your clients. If you are an insurer, insurance agent or broker, giving just any gift, even one that costs less than \$15, may violate New York’s Insurance Laws.

prospective client that is not specified in the policy. The language of the statute provides, in relevant part:

No authorized insurer, no licensed insurance agent, no licensed insurance broker, and no employee or other representa-

tative of any such insurer, agent or broker shall make, procure or negotiate any contract of insurance other than as plainly expressed in the policy or other written contract issued or to be issued as

evidence thereof, or shall directly or indirectly, by giving or sharing a commission or in any manner whatsoever, pay or allow or offer to pay or allow to the insured or to any employee of the insured, either as an inducement to the making of insurance or after insurance has been effected, any rebate from the premium which is specified in the policy, or any special favor or advantage in the divi-

not specified in such policy or contract.

Section 2324(a) provides an exception, however, for “**any article of merchandise not exceeding fifteen dollars in value which shall have conspicuously stamped or printed thereon the advertisement of the insurer, agent or broker...**” (emphasis added). This exception for an article of merchandise under \$15 is commonly referred to as “the keepsake exception.”

What exactly is a keepsake? According to Dictionary.com, a keepsake is “anything kept, or given to be kept, as a token of friendship or affection; remembrance.” This notion that a keepsake is something “given to be kept” suggests that a keepsake should have an everlasting quality or be something of permanence.

A review of New York State Insurance Department Office of General Counsel Opinions (“OGC”) that address promotional gifts, rebates, and giveaways, offers some guidance as to what constitutes a keepsake under New York’s Insurance Laws. For instance, on June 10, 2008, the OGC opined that a licensed property and casualty insurance agent could not lawfully offer a \$10 gift card for purchasing gas to current clients who refer non-clients to an insurance company for a quote. (See Opinion No. 08-06-05). The Department reasoned that the \$10 gift

embossed upon the card—because the card is intended to be traded away for a tangible gift—gas—and therefore not designed to keep the company’s name before the consumer.”

Likewise, in a May 7, 2003 opinion, the OGC explained that a \$15 gas card is not a “keepsake” because it “is expected to be used shortly after receipt and then be discarded”. (See OGC Op. No. 03-05-05; see also OGC Op. No. 04-08-03, Aug. 3, 2004) (“Inasmuch as the gift certificate or the [gas]



Sari Gabay-Rafiy



card being offered is not a ‘keepsake’ within the meaning of the statute but is expected to be used shortly after receipt and then be discarded, it would not fall under the ‘keepsake’ exception of N.Y. Ins. Law § 2324 even if the agency name was placed upon it.”

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Is a phone card with a \$1.24 value viewed any differently by the Department than a gas card? Apparently not. In a May 14, 2002 OGC opinion addressing phone cards, the OGC found that if a property and casualty insurer gave its insureds a phone card with ten minutes of free calling anywhere in the continental United States and displayed the name and address of the insurer on the front of the phone card, the phone card would not qualify under the “keepsake” exception. (See OGC Op. No. 02-05-17). Although the value of the phone card was well under \$15 and the insurer’s name was printed on the front, the Department reasoned that the giving of the phone card after the insurance has been procured would be valuable consideration not plainly expressed in the policy and would give its insureds an inducement to renew the relationship when the policy period

... “[i]t is typical that a phone card is used shortly after receipt in exchange for calling and then would be discarded.” Thus, a phone card does not qualify as an “article of merchandise” pursuant to the “keepsake” exception of § 2324(a).

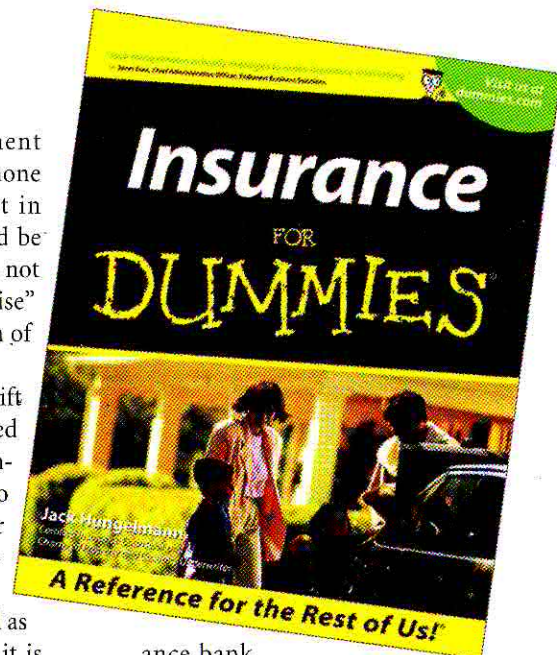
ends. Moreover, the Department explained, “[i]t is typical that a phone card is used shortly after receipt in exchange for calling and then would be discarded.” Thus, a phone card does not qualify as an “article of merchandise” pursuant to the “keepsake” exception of § 2324(a).

The same holds true for a \$5 gift card; the Department has concluded that a property and casualty agent cannot lawfully give a \$5 gift card to potential insureds as a reward for accepting insurance quotes from the agent. The Department reasoned, “despite the low value of the gift card as it is not an article of merchandise it is rather more similar to cash and thus it would not qualify for the exemption and it would be an illegal inducement.” (See OGC Op. No. 05-04-16, April 22, 2005).

Though it is apparent that gift cards and phone cards do not fall under the “keepsake” exception, can you lawfully give a client a book? Well, that depends. According to a September 22, 2008 opinion, an insurance agent or broker cannot lawfully give the book *Insurance for Dummies* to clients and prospective clients where the retail price of the book was \$21.99 but the wholesale price of the book was less than \$15. (See OGC Op. No. 08-09-06). The Department explained that “the relevant price of the articles of merchandise is the retail value to the person receiving the article of merchandise – not the cost to the licensee.” (See OGC Op. No. 04-02-07, Dec. 9, 2004). Since the book’s retail value of \$21.99 exceeded the \$15 statutory limit, it was not a permissible keepsake. Moreover, the Department noted that the stapling of the agent’s or broker’s business card to the cover of the book “does not emboss, print or stamp the insurer or producer’s name.” Under such circumstances, the book was considered an unlawful inducement.

Unlike § 2324(a) which applies to property and casualty insurance, Insurance Law § 4224(c), which addresses rebating and prohibited inducements in the area of life, accident, and health insurance, does not have a keepsake exception. The statute reads, in relevant part:

no such life insurance company and no such savings and insur-



ance bank and no officer, agent, solicitor or representative thereof and no such insurer doing in this state the business of accident and health insurance and no officer, agent, solicitor or representative thereof, and no licensed insurance broker and no employee or other representative of any such insurer, agent or broker, shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to any person to insure, or shall give, sell or purchase, or offer to give, sell or purchase, as such inducement, or interdependent with any policy of life insurance or annuity contract or policy of accident and health insurance, any stocks, bonds, or other securities, or any dividends or profits accruing or to accrue thereon, or any valuable consideration or inducement whatever not specified in such policy or contract; nor shall any person in this state knowingly receive as such inducement, any rebate of premium or policy fee or any special favor or advantage in the dividends or other benefits to accrue on any such policy or contract, or knowingly receive any paid employment or contract for services of any kind, or any valuable consideration or inducement whatever which is not specified in such policy or contract.

In light of Section 4224(c), any gift whatsoever by a life or health agent or

giving permissible because the promotional keepsake items were to be distrib-

in *retail* value, and, that your company name is conspicuously stamped on the

So as you shop for the holidays, if you are considering buying gifts for insureds and prospective insureds, make sure it is an “article of merchandise” less than \$15 in *retail* value, and, that your company name is conspicuously stamped on the gift.

broker or life insurance company to a current or prospective client could be considered an unlawful rebate or inducement.

In fact, the Department has explicitly acknowledged that a life insurance agent or broker may not distribute promotional novelties in connection with the sale of life, accident and health insurance unless it is specified in the policy or contract as it would constitute an inducement to purchase such insurance in violation of §4224, even if the recipient of such promotional novelty did not purchase an insurance policy. (See OGC Op. No. 05-11-19, Nov. 15, 2005). And, in another opinion, while the Department explained that a property and casualty insurance agent or broker may distribute promotional items under \$15, such as a cup, magnet, or pen to prospective clients, the Department specifically stated, “[w]ith respect to life, accident and health insurance, an agent or broker may not distribute promotional novelties in connection with the sale of insurance unless it is specified in the policy or contract.” (See OGC Op. No. 03-06-21, June 23, 2003)

While there are heightened standards applicable to life, accident, and health insurance agents, it appears that some gifts are permissible, so long as they are not in any way tied to the purchase of insurance. For example, according to OGC Op. No. 07-06-22 (June 26, 2007), life and health insurance agents can lawfully distribute pens, key chains, and flashlights that have a value of less than \$2 each *where the items are freely distributed to the general public and not tied to any sale or solicitation of insurance*. The Department apparently found such gift

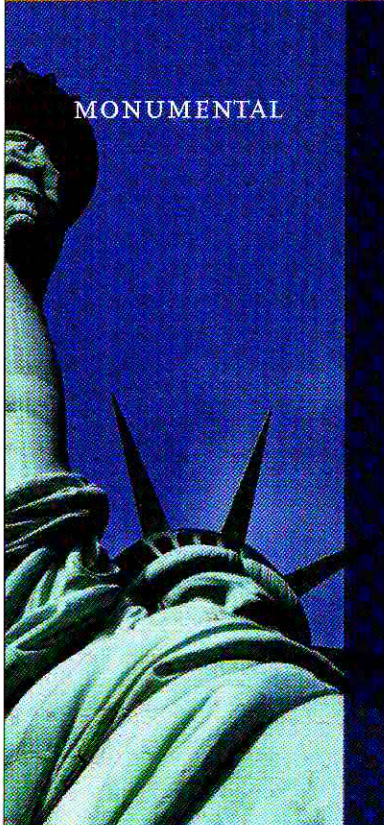
uted to “any and all attendees” at a home and garden trade show, and not solely to prospective customers of insurance or those interested in purchasing insurance. It is not clear whether the OGC would have arrived at the same result if the promotional gifts were distributed exclusively at an insurance trade show.

So as you shop for the holidays, if you are considering buying gifts for insureds and prospective insureds, make sure it is an “article of merchandise” less than \$15


gift. Though a gas card or gift certificate may have been much appreciated this season, stick to pens, mugs, magnets, and other small tangible items. From a marketing perspective, you’ll probably get more mileage and name recognition from a permanent desk item anyway! [A]

This article is for informational purposes only and is not intended to give legal advice. For more information, please contact the author at (212)941-5025 or gabay@gabaybowler.com.

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