

# ink spots

## Ad Spots and Blind Spots: Spotlighting Agents' Advertising and the Law



Anne Marie Bowler

CALL YOUR  
Independent Professional Agent

- ✓ Experts in Protecting You
- ✓ We Insure You Against Loss and Pay Your Claims Paid!
- ✓ Call Us to Bind Coverage.  
No answer? Leave a Message. You're Covered!
- ✓ Our Insurance Company is C+ Rated...  
Better Than Average!!

**CAPONE, MADOFF  
BONNIE & CLYDE**



Your Insurer May Be Found  
Right Here in Bumsville.  
Stop by! Knock hard!



Member: Top "Performers" Association

SEARCHER STEEL WINDOW

WESTCHESTER WINDOW WORKS  
INC.

THERMO-FLEX WINDOW  
SYSTEMS LTD

WIDE WORLD HOME  
IMPROVEMENT

WINDON WAREHOUSE INC

WINDON WAREHOUSE INC

WASH SCREEN & WINDOW

W



*Do you provide the "best rates," have "competitive prices," provide "all forms of insurance," at the "lowest cost?" Of course – but don't put that in an advertisement!*

As a broker or agent, when drafting an advertisement you must balance the desire to attract customers and stand out in the market, with the concern that the language of your advertisement may violate New York Insurance Laws.

The New York Insurance Department has disciplined agents and brokers for violating the vague statute that regulates advertisements. Because the Department does not pre-approve advertisements, it is imperative that you are aware of the State's Insurance Laws, and the Department's interpretations, before you produce your next advertisement.

## **What Are The Laws and Regulations For Advertisements By Agents and Brokers?**

### **Insurance Law Section 2122**

Insurance Law § 2122 has three requirements for advertisements for all agents and brokers:

- (a)(1) an advertisement may not make known the financial condition of an insurer without complying with certain requirements;
- (a)(2) no advertisement shall call attention to any unauthorized insurer; and
- (b) in all advertisements "which refer

to an insurer" the broker shall set forth the name of the insurer "referred to" and the name of the city, town or village in which it has its principal office in the United States.

As opposed to the detailed Regulations governing advertisements for accident and health insurance (as summarized below), there are no separate Regulations governing advertisements for property and casualty brokers and agents. P&C brokers are guided by the Opinions of the Office of General Counsel. The Department is currently preparing a regulation for property/casualty advertisements. See O.G.C. Opinion No. 08-08-07 (August 26, 2008). In the meantime, property and casualty brokers should also review the regulations for accident and health insurance before finalizing any advertisement as they offer substantial guidance in terms of the language that most concerns the Department. See O.G.C. Opinion No. 08-08-07 (August 26, 2008).

### **Regulations For Accident and Health Insurance Advertisements**

Regulations 34 governs advertisements for accident and health insurance advertisements. Besides providing that the advertisements must be clear, not misleading and that the terminology be understandable to the average person, the Regulations for advertisements in this area specifically list terminology that may not be used.

For example, *prohibited* words include: "all," "full," "complete," "comprehensive," "unlimited," "up to," "as high as," "tax free," "extra cash," "extra income," "extra pay," and "low cost plan." See 11 NYCRR 215.6. Further, an advertisement shall not use the words "only," "just," "merely," "minimum," or similar words to describe the applicability of any exceptions or reductions. See 11 NYCRR 215.6(3).

Testimonials must be genuine, represent the current opinion of the author and be applicable to the policy advertised and be accurately reproduced. See 11 NYCRR 215.8(a). If someone is compensated for a testimonial, such information must be disclosed as well. See 11 NYCRR 215.8(b).

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### **Other State Statutes**

New York Penal Law § 190.20 also applies to advertisements. It provides, "A person is guilty of false advertising, when, with intent to promote the sale or to increase the consumption of property or services, he makes or causes to be made a false or misleading statement in any advertisements."

Further, N.Y. General Business Law § 350 provides, "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful."

The Office of General Counsel Opinions routinely cite the Penal Law and General Business Law when analyzing advertisements.

### **What is an Advertisement?**

Section 2122 applies to "any advertisement, sign, pamphlet, circular, card or other public announcement." The rules governing accident and health insurance advertisements further define "advertisements" to include (1) printed and published material, audio-visual material, and descriptive literature of an

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insurer used in direct mail, newspapers, magazines, radio scripts, TV scripts, billboards and similar displays; (2) descriptive literature and sales aids of all kinds issued by an insurer, agent or broker for presentation to members of the insurance buying public, including but not limited to circulars, leaflets, booklets, depictions, illustrations and form letters; and (3) prepared sales talks, presentations and material for use by agents, brokers and solicitors.” 11 NYCRR § 215.3(a).

To broaden the scope of Section 2122, the Department has utilized the broad definition of the term “advertisement” from the regulations governing life insurance policies and annuity contracts to an advertisement of a property and casualty broker. See O.G.C. Opinion No. 08-08-07 (August 26, 2008). The regulation provides that the term advertisement shall not be limited to: “(1) printed and published material, audio visual material and descriptive literature of an insurer used in direct mail, newspapers, magazines, radio scripts, television

scripts, billboards and similar displays; (2) descriptive literature and sales aids of all kinds, including but not limited to circulars, leaflets, booklets, depictions, illustrations and form letters, issued by an insurer, agent, broker, solicitor or organization sponsoring the insurance for presentation to members of the insurance buying public; (3) prepared sales talks, presentations and material for use by agents, brokers and solicitors; (4) material used for recruitment, training and education of an insurer’s sales personnel, agents, brokers and solicitors.” 11 NYCRR § 219.3(a)

Accordingly, the Section 2122 applies to more than your simple Yellow Page advertisements. Rather, it covers a wide-range of media where a broker or agent may find an opportunity to publicize its business.

## The Office of General Counsel’s Interpretation:

### Terms You May Not Use, if You Do Not Comply With § 2122(b):

In addition to the phrases explicitly prohibited under accident and health insurance regulations (above), the Office of General Counsel has opined that all agents and brokers may not use the terms “compare rates,” “save money,” and “take advantage of low rates,” or other words to that affect,” unless the advertisement refers to an insurer or group of insurers which whom coverage may be placed, otherwise the advertisement is deceptive and misleading. Office of General Counsel Opinion No. 98-67 (September 16, 1998). This 1998 Opinion is the most explicit Opinion regarding phrases that may not be used.

### Where It Is Not So Clear-Cut:

A plain reading of Section 2122(b) suggests that if your advertisement does not “refer to an insurer,” you are not required to list the name of the city, town or village in which it has its principal office in the United States. However, it’s not that simple.

The Office of General Counsel has found that even if the advertisement does not explicitly refer to an insurer, the language of your advertisement may be specific enough to *implicitly* refer to an insurer and require compliance with Section 2122(b), whereby you must include the name of the city, town or village in which the insurer has its principal office in the United States.

In limited circumstances, the Department has opined that where a brokerage company “represents several insurers, uses generic language and does not mention specific prices in advertisements, it would fall outside the bounds of N.Y. Ins. Law § 2122(b) and would not constitute a violation thereof.” O.G.C. Opinion No. 04-06-09 (June 10, 2004); See also O.G.C. 05-06-24 (June 22, 2005); O.G.C.; O.G.C. Opinion No. 03-02-20 (February 19, 2003).

## Is Your Advertisement’s Language Generic Enough to Fall Outside of § 2122(b) Requirements? – Some Examples:

Whether your advertisement fits within the above standard is highly factual. As evidenced from the O.G.C. Opinions below, even if you do not list a specific insurance company or state a specific premium, the Department’s position on whether your advertisement’s language is generic enough varies based on the facts.

### • “Lowest Available Rates”

The Department has opined that the phrase “lowest available rates” invites a prospective insured to both save money and take advantage of low rates. “The public may reasonably interpret the advertisement to mean that a potential insured can get the lowest rates available anywhere for this type of insurance. Therefore, the advertisement implicitly refers to an insurer or group of insurers, which requires that the insurer or insurers be named together with the location of its principal office.” Office of General Counsel Opinion No. 08-08-07 (August 26, 2008).

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• **"Affordable Policies For All Trade Contractors"**

The Office of General Counsel has held that an advertisement stating that it "provides affordable policies for all trade contractors" is false and misleading and violates Section 2122(b). Office of General Counsel, January 11, 2006. The Department reasoned that the advertisement was misleading because the company did not provide every type of contractor policy, nor could the company assert that coverage for every contractor would be affordable even for those types it does not provide. The advertisement further violated Section 2122(b) because the agent only provided a shortened name of the insurance company.

• **"Potential to save up to X amount"**

In this 2005 Opinion, the Department held that "by mentioning potential savings up to a particular amount or an average dollar amount saved across the board, such an advertisement refers to a specific insurer, and must therefore comply with § 2122(b)."

• **"We guarantee to save you money," "We guarantee satisfaction in doing business with our agency"**

The Office of General Counsel opined that an advertisement guaranteeing to save the insured money and guaranteeing satisfaction with service was misleading, even if the word "guarantee" was changed to "promise." O.G.C. Opinion (June 10, 2004). The Department reasoned that it cannot be guaranteed that every insured can save money, nor can it be guaranteed that every insured is satisfied. The Department compared this language with language offering the "potential" for saving, which may be acceptable.

• **"I saved over \$102 on my car insurance"**

The Department found this testimonial required compliance with Section 2122(b), listing the name of the city, town or village in which it has its principal office in the United States because, by mentioning a spe-

cific amount saved, the advertisement must be making reference to a specific insurer. O.G.C. Opinion (June 10, 2004)

• **"For Money Saving Offers"**

The Office of General Counsel found that an advertisement stating "for money-saving offers, please visit Agent X" was not required to comply with Section 2122(b) because (a) it was very general, (b) it did not name the specific insurer or insurers represented by the agent, (c) it did not mention a specific price; and (d) the advertisement "merely alludes to the possibility that the agent could potentially save a prospective insured an indeterminate amount on premiums." O.G.C. Opinion (February 19, 2003). The Department also evaluated whether the representations made in the advertisement conform to the actual quality and cost of the goods or services.

• **"Savings of up to 37% on Auto Insurance"**

The Department has found that an advertisement stating "Savings of up to 37% on Auto Insurance," where the broker recently saved someone up to 37% with no coverage change, "does not refer to a particular insurer and indicates only a potential 'savings up to 37%' where the producer represents more than one insurer" See OGC Op. (June 5, 2001). The Department reasoned that the advertisement reflected "the licensee's ability to shop around and obtain a more favorable rate for the insured although not necessarily the same insurer in each case." Critical to the Department's analysis was the fact that the broker represented more than one insurer.

• **"If you buy direct from XYZ you could save as much as XX% or more on car insurance!"**

In this 2000 Office of General Counsel Opinion, the Department found that because the advertisement only refers to a potential premium savings over the rates of other unspecified insurers and no direct comparison between insurers is being made, the statement does not

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Independent Professional


✓ Experts in Protecting You

✓ We Insure You Against Loss  
and Pay Your Claims Paid!

✓ Call Us to Bind Coverage.  
No answer? Leave a Message.

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Better Than Average!!

**CAPONE, MAD  
BONNIE & CLY**



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refer to a particular insured and does not require compliance with Section 2122(b). O.G.C. Opinion (February 28, 2000).

**Conclusion:**

As demonstrated above, complying with the Department's advertising laws and regulations is not as simple as avoiding certain key phrases. Rather, until the Department comes out with detailed regulations, the legality of each advertisement will be determined by the Department on a case-by-case basis. So tread cautiously and look towards eye-catching fonts, as opposed to eye-catching terms! **[A]**