

Considerations for Insurers in the Aftermath of the MetLife Consent Decree

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MetLife Consent Decree

On March 26, 2014, the New York Department of Financial Services (the "DFS") entered into a consent decree ("Consent Decree") with MetLife, Inc. and its subsidiaries, American Life Insurance Company ("ALICO") and Delaware American Life Insurance Company ("DelAm") (collectively, the "MetLife Parties") in which MetLife Inc. agreed to pay a \$50 million fine for alleged violations of the New York Insurance Law ("Insurance Law"). According to the Consent Decree, the MetLife Parties, without a license and through unlicensed sales representatives solicited and sold insurance to multinational companies in New York without being licensed. The \$50 million fine is the largest ever assessed for violations of the New York Insurance Law. According to the Consent Decree, it was based on the fact that ALICO and certain alien insurers "collected approximately \$900 million in premiums (including renewals) from multinational corporations involving contact with its New York sales representatives from 2007 to 2012." As part of the Consent Decree, the MetLife Parties also agreed to cooperate fully with the continuing investigation of possible violations related to activities prior to November, 2010, when American International Group, Inc. ("AIG") owned ALICO and DelAm. Among the facts agreed to by the DFS and the MetLife Parties was that ALICO, "while operating as a subsidiary of AIG in 2009, [had] made intentional misrepresentations and omissions to the NYSID [DFS's predecessor] concerning its business activities in New York." In addition, MetLife, Inc. agreed to file quarterly reports with the DFS regarding the insurance activities of ALICO, DelAm and the marketing arm of MetLife for sales of insurance products to multinational companies. The Consent Decree states that, prior to and after the sale to MetLife, sales representatives of ALICO, DelAm, MetLife and AIG engaged in insurance solicitations on behalf of ALICO and DelAm without the sales representatives being licensed as insurance agents or brokers and that neither of the two subsidiaries was admitted in New York to transact insurance at the time. According to the Consent Decree, the sales representatives conducted meetings in New York regarding group insurance products and had extensive contact with multinational clients, including periodic visits, regular phone calls and e-mails. Moreover, according to the Consent Decree, sales representatives

conducted "road shows" in New York to solicit and sell group insurance products to multinational clients. Although the Consent Decree does not allege that any insurance policies were actually issued for delivery in New York, the DFS found that the MetLife Parties violated Section 2102 of the Insurance Law, which is the insurance producer licensing section. The DFS also found that the sales representatives of the MetLife Parties violated Section 2117 of the Insurance Law, which prohibits acting for or aiding an unauthorized insurer. Finally, the DFS found that the MetLife Parties violated Section 1102 of the Insurance Law, which requires that an insurer transacting insurance in the state be licensed. **MetLife Deferred Prosecution Agreement**

Concurrent with the civil settlement with the DFS, MetLife agreed to a "Deferred Prosecution Agreement" ("DPA") with the New York County District Attorney's Office. By the DPA, MetLife "admitted to conduct that made it and the subsidiaries vulnerable to prosecution for "unlicensed insurance business operations and for filing a false instrument with the New York State Department of Insurance," a Class E felony under the New York Penal Law. According to the DPA, the genesis of the false filing was that "in 2009, ALICO . . . filed a document with the New York State insurance regulators seeking an opinion as to whether ALICO required a license to operate. It was falsely represented in that document that ALICO conducted no insurance business from within New York, but rather, only had administrative and back office personnel acting on its behalf in New York." As part of the agreement with the District Attorney's Office, MetLife was fined \$10 million, which, according to the press release issued by the District Attorney's Office, is "approximately equal to the profits earned over a two year period from its unlicensed insurance activity in New York." According to the District Attorney's Office, MetLife might also be liable for yet to be determined tax underpayments resulting from its illegal conduct. **AIG Complaint**

The DFS also notified AIG that it would seek an administrative proceeding against AIG and potentially impose significant penalties on AIG for its activities on behalf of ALICO and DelAm prior to their acquisition by MetLife. Shortly after MetLife agreed to the Consent Decree, AIG filed suit in federal district court in New York seeking to enjoin the DFS from commencing or continuing any proceeding or imposing any penalty for ALICO's failure to be licensed in New York, and for its sales personnel failure to become licensed agents before soliciting business in New York. In its complaint ("AIG Complaint"), AIG alleges that the DFS's interpretation of Insurance Law Sections 1101(b)(1)(A)-(E) and 1102 violates the Due Process Clause of the 14th Amendment to the U.S. Constitution on grounds of vagueness. Insurance Law Sections 1101(b)(1)(A)-(E) define the acts constituting an insurance business and Section 1102 states that unless exempted from such requirement or licensed, no person or company shall do an insurance business in New York. According to the AIG Complaint, the statute's vagueness results from the fact that "no reasonably prudent person, familiar with the insurance industry and regulation, would understand" that a New York insurance license is required for selling insurance covering out of state and out of country employees of multinational companies. The AIG Complaint further alleges that any DFS penalty for marketing insurance products to foreign insureds violates the First Amendment as an abridgement of freedom of speech, particularly since the DFS has not alleged "that the speech was false, misleading or anything other than entirely truthful and accurate." Finally, the AIG Complaint alleges that the DFS's

application of the Insurance Law's statutory and regulatory scheme violates the U.S. Constitution's dormant Commerce Clause, because the DFS's interpretation of its statutory and regulatory scheme "discriminates against out-of-state and foreign commerce." This is so, according to the Complaint, because the DFS interprets the Insurance Law and related regulations "to preclude the issuance of a New York Insurance License to a company that markets from or into New York insurance products that exclusively cover foreign insureds and maintains no insurance premiums in New York." The AIG Complaint alleges that ALICO could not even provide much of the information necessary to obtain a New York license, since such information dealt specifically with business written in New York. Moreover, AIG alleges that when it owned ALICO, officials from the DFS (formerly the Department of Insurance) indicated ALICO "was ineligible for a New York license." The AIG Complaint points out that the statutory language of Section 1101(b) defining the acts that constitute doing an insurance business, as well as the legislative history of that Section, make clear that the statute was intended to protect "residents" of New York from "unscrupulous insurance companies selling fraudulent or unregulated products." The AIG Complaint states that "[n]othing in the language or legislative history of the New York Insurance Law extends the definition of 'doing an insurance business' so far as to reach the marketing activities at issue here, which involved insurance contracts issued outside of New York to and on behalf of non-New York insureds." Unlike the New York Insurance Law, the NAIC Non-Admitted Insurance Model Act and various similar (but not identical) state laws do not limit the language "to a resident of this state." Rather, those laws apply to the "transaction of insurance in this state" whether such acts reach residents or non-residents. The AIG case may turn on how and under what circumstances New York defines "resident" for purposes of the Insurance Laws' application to a multinational company. **Questions Raised by Actions of the DFS; What Should Insurers Do?**

Although the DFS's interpretation of the "doing business" provisions of the Insurance Law is consistent with past interpretations provided by the Insurance Department's Office of General Counsel, it does not appear that anyone has ever filed a judicial challenge to this interpretation based on the plain language of the statute. As it stands, the Consent Decree, the Deferred Prosecution Agreement and the AIG Complaint raise a number of questions.

- Is an agent of a non-New York insurer that is not licensed in New York now prohibited from speaking with people who happen to be physically present in New York even if such people are non-residents of New York?
- If employees of a multinational company visit New York for a trade show and an unlicensed insurer is one of the moderators or hosts of the show, can the insurer's representative say anything about his own company's products without being accused of soliciting business?
- Should insurers that find they and their agents have done an unauthorized insurance business in New York follow the District Attorney's Office recommendation "to self-report irregularities" or risk having their activity discovered by the DFS?

Furthermore, the Consent Decree requires that "the alien insurer shall not maintain an office in this

state." However, according to the Consent Decree, the DFS previously acknowledged to ALICO's outside counsel that it would be permissible for an unlicensed insurer to have an office and provide "back office" operations in New York. Thus the Consent Decree appears to hold MetLife and its subsidiaries to a higher standard than the law requires. It is possible that without further clarification, the Consent Decree reflects that the DFS holds a much narrower view of what constitutes "back office" activities than the insurance industry. Based on the Consent Decree and Deferred Prosecution Agreement, as well as the continuing investigation of AIG, insurers not licensed to transact insurance in New York should review their and their agents' activities to make certain they are not engaging in prohibited insurance solicitations in New York or in business activity that overly energetic government attorneys might mistakenly view as violative of New York law. It is also worth noting that the DFS might have a much different idea of what type, if any, of penalty to assess if the amount of business written in New York by an unauthorized insurer were much smaller than the premiums written in the current case.

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