



## AB 2956 - The Distinction Between an Agent and a Broker, Signed Into Law

By: Robert W. Hogeboom

September 26, 2008

On September 25, 2008, Governor Arnold Schwarzenegger signed AB 2956 into law. As many of you know I have recently held seminars in Los Angeles, New York, Washington D.C. and Hartford on this very important bill which affects insurers and producers in California. AB 2956 seeks to clarify the legal distinction between an agent and a broker. This affects insurers' liability and whether a producer as a broker may charge broker fees.

AB 2956 was proposed by the producer trade associations in California in response to efforts by the prior administration and plaintiff lawyers to define a list of activities any one of which would render a broker an agent (the "any one act" test). These activities served as the basis for various lawsuits and Department of Insurance disciplinary actions against brokers and insurers claiming that the brokers were defacto agents of the insurer.

The bill codifies the totality of circumstances test that has long been the common rule in California. It expands the role of the current statutory presumption of broker, increases disclosure consumer requirements, and clarifies Section CIC 1732 which was relied upon to support the any one act test.

A summary of AB 2956 is as follows:

1. The definitions of agent and broker in Sections 1621 and 1623 are changed to reflect that they transact in the "admitted" market. Thus, surplus lines brokers are not

affected by the bill and remained governed by Part 2, Chapter 6 (Section 1760 et seq. of the Code).

2. The presumption of broker as contained in Section 1623 is changed. The former language created a presumption of broker "for licensing purposes only" if the application showed that the person is acting as a broker and licensed as a broker. This language was considered too vague. AB 2956 changed the presumption language by: (a) clarifying that a person is presumed to be acting as an insurance broker if the person is licensed to act as a broker, maintains a broker bond, and in a written agreement signed by the consumer includes each of the following:
  - i. that the person is transacting on behalf of the consumer;
  - ii. a description of the basic services to be performed as a broker;
  - iii. amount of broker fee charged;
  - iv. if applicable, the fact that the broker may be entitled to receive compensation from the insurer from the consumer's purchase of insurance.

Newly created Section 1623(b) permits a wholesale intermediary broker to avail itself of the presumption if it provides the above written disclosures to the retail broker.

Section 1623(c) provides the following acts, any one of which will rebut the presumption: that the licensee is appointed; has a written agreement with the insurer authorizing the licensee to obligate or bind the insurer without prior notification or is authorized to pay claims. In all other cases, the presumption of broker status may only be rebutted based on the totality of the circumstances indicating that the producer is acting on behalf of the insurer.

Section 1623(e) defines “totality of the circumstances” as evidence indicating whether the producer was acting on behalf of the insurer or on behalf of a third person. The definition sets forth how the evidentiary determination is made. It includes a review of all relevant facts and circumstances. It establishes that the review cannot be limited to any particular fact or factors nor requires that any particular circumstance receive greater or lesser weight than another circumstance. Finally, Section 1732 was amended to permit a broker, on behalf of an insurer, to collect and transmit premium and deliver policies evidencing insurance.

While the totality of the circumstances test refers specifically to the presumption in Section 1623, legislative consultants for both the Assembly and Senate confirmed, in their written analysis of the bill, that totality of the circumstances has been the long-standing test to determine whether a producer is acting as a broker or agent and rejected the “any one act” test.

Robert W. Hogeboom is a Partner of Barger & Wolen, LLP in the Los Angeles office. He practices insurance regulatory and administrative law. He is a member of the Agents and Brokers Task Force and member of the special subcommittee dealing with the clarification of agent and broker.

Because of the large response to the seminars on AB 2956, I am extending specialized seminars at no charge for insurers and large producers at their home office.

For more information, or to schedule a seminar, you may contact me directly at (213) 680-2800 or [rhogeboom@bargerwolen.com](mailto:rhogeboom@bargerwolen.com).