THE TAKE ALL COMERS RULE VS RESTRICTIVE COVENANTS

BASELESS ARGUMENT OR VIABLE CONCERN

As a law firm that has a legacy in the Insurance Industry, our Managing Lawyer Ron Smith, was formerly a broker with RIBO, and current advocate for the independent broker channel. We deal with restrictive covenant issues and violations on a weekly basis. Recently, we have had several brokerages that oppose our clients, seeking to use the Take all Comers Rule as a basis for non-compliance with their restrictive covenants within personal lines business. As all good firms do, we looked to uncover the basis for where such an interpretation came from and whether its hold any validity.

Background

The 'Take All Comers Rule' or the 'TAC Rule' has received much regulatory attention lately. The TAC Rule which is derived from law, was initially established in 2009 by the Financial Services Commission of Ontario (now FSRA), via its bulletin on "Automobile Insurance Quoting and Underwriting Practices" was updated in November 2021 guidance issued by the Financial Services Regulatory Authority of Ontario (FSRA). The FSRA Guidance kicked off the following TAC Rule activity.

- Seeing as the ·TAC Rule involves regulatory interpretation of "unfair or deceptive acts and practices", the TAC Rule needed to be reconsidered in light of the April 1, 2022 enactment of FSRA's new Unfair and Deceptive Acts and Practices (UDAP) Rule which replaced the now repealed Unfair or Deceptive Acts and Practices regulation to the Insurance Act (Ontario) (OIA).
- The re-consideration led to FSRA having to update its 6-month old guidance on April 7, 2022.
- Not to be outdone, the Registered Insurance Brokers of Ontario (RIBO), the regulator who oversees broker conduct, reached out to its members in 2022 on the application of the TAC Rule via various townhalls where it was clear in its goals to oversee broker compliance in this area.
- ·RIBO has conducted broker spot checks regarding TAC Rule compliance in the fall of 2022 and these spot checks have continued into 2023.
- RIBO's findings had led to the publication of a TAC Spot Check Interim Report on November 21, 2022, with a final report expected in 2023.

Given all this regulatory activity, it's not surprising that the industry has the TAC Rule on its mind and that some are wondering as to how widely this rule can be applied.

Take All Comers (TAC) Rule - What is it?

The TAC Rule is a term used to describe automobile insurer obligations under the OIA that, if violated, might also violate certain automobile provisions of the UDAP Rule. The OIA obligations are long-standing requirements and are quite narrow in scope. However, the UDAP Rule and recent FSRA guidance suggests a much broader interpretation.

The narrow OIA provisions are as follows:

S. 237(1) - If so required by the regulations and unless the insurer has complied therewith, an insurer shall not decline to issue or terminate or refuse to renew a contract in respect of such coverages and endorsements as may be set out in the

regulations or decline to issue, terminate or refuse to renew any contract or refuse to provide or continue any coverage or endorsement on any ground set out in the regulations.

S. 238(1) - An insurer shall not decline to issue, terminate or refuse to renew a contract or refuse to provide or continue a coverage or endorsement, except on a ground filed with the Chief Executive Officer under this section.

Simply put, section 237 prohibits insurers from considering 19 prescribed reasons set out in the Automobile Insurance regulations when deciding whether to issue, terminate or renew an automobile insurance contract. Section 238 imposes an obligation on insurers to file with FSRA the grounds upon which an insurance contract is refused, terminated on not renewed.

FSRA's UDAP Rule became effective April 1, 2022, and replaced the Unfair or Deceptive Acts or Practices regulation to the OIA, which was revoked on the same day. The purpose of the UDAP Rule is to set out various practices that amount to "unfair or deceptive acts or practices" within the meaning of section 438 of the OIA and which are prohibited by section 439 of the OIA. The UDAP Rule includes two new automobile provisions describing practices considered to amount to unfair or deceptive acts or practices. These provisions are considered to form part of the TAC Rule.

Section 9(1) Unfair treatment by an agent, broker, or insurer to a customer with regard to any matter relating to quotations for automobile insurance, applications for automobile insurance, issuance of contracts of automobile insurance or renewals of existing contracts of automobile insurance, including but not limited to,

(i) variance of formal or informal processes and procedures which make it more difficult for certain persons to interact with an insurer, broker, or agent for the purpose of discouraging or delaying such persons from applying for, renewing or obtaining automobile insurance.

Regulatory Interpretation

Section 9 of the UDAP Rule suggests a wider scope.Not only are insurers (and brokers) prohibited from denying automobile insurance based on the enumerated grounds. But any process that makes it difficult for certain persons to interact with an insurer or broker for the purpose of discouraging such persons from applying for automobile insurance is an unfair or

deceptive act or practice.

FSRA, in its recently released guidance, latches on to this wider scope when it states that "practices that hinder, delay or frustrate consumers' efforts to shop for or purchase automobile insurance are not in the public interest and conflict with the intent of the [Insurance] Act, UDAP and the FSRA Act, particularly where such practices discourage a consumer from making or pursuing a request for a quote or for coverage from a particular insurer or affiliated group of insurers, or results in a consumer having to abandon such a request."

The Potential Argument

A common-sense interpretation suggests a laudable goal. Automobile insurance consumers should be able to obtain affordable insurance, and this involves being able to freely access quotes and not being unfairly discriminated against.

However, the broad interpretation of the TAC Rule has led to some even broader interpretations. For example, does the TAC Rule prevent brokers from honouring restrictive covenants such as non-solicitation and non-competition clauses? After all, depending on how these clauses are drafted, a broker honouring their contractual commitments may need to turn away a prospective client. Such an action would clearly hinder, delay, or frustrate the prospective client's effort to shop for or purchase automobile insurance. But does it? Let's take a closer look.

Restrictive Covenants

There is nothing in the OIA, the UDAP Rule, or FSRA's guidance that speaks to factors particular to a broker that might frustrate a client's ability to obtain automobile insurance quotes from that broker.

All the prohibited factors in the Automobile regulation speak to factors that would apply to the prospective client. **For brokers, it is instructive that RIBO has focused on the narrower view of the TAC Rule in its publications, which are currently summarized in its November 21, 2022 TAC Spot Check Interim Report (the Report).** The Report's interim findings (they are interim as RIBO continues to conduct spot checks into 2023 and plans to issue a Final Report) speak to general broker compliance with the TAC Rule and that "there have been no examples found to date where brokers avoided providing automobile insurance quotations based on customers' residence location, customer insurance experience, customers who experienced a prior accident benefits loss or customers not purchasing a property policy. The spot check findings did not find

any instances where brokers refused to provide automobile insurance quotations."

Clearly, RIBO has focused its attention on ensuring that brokers do not assist insurers in considering any of the enumerated prohibited grounds. Going further, RIBO reminds brokers that brokers "must inform the consumer if a market has declined to provide a quote and report any instance when they are dissuaded or forced to abandon a request for a quote to RIBO and/or FSRA." So, it appears that RIBO's present focus is on the declination by the insurance company, facilitated by the broker, rather than a declination by the broker itself, which would be the case when a broker refuses to service a client due to honouring a restrictive covenant.

Thus, it appears as if the TAC Rule is merely another argument that may be raised in the ongoing battle between those who want non-solicitation and non-competition clauses enforced and those who do not. These clauses are commonly used by the industry to protect their markets and are just as commonly fought over when individual brokers move brokerages.

This ongoing battle only recently had to contend with 2021 changes to the Employment Standards Act (Ontario) that made most non-competition clauses entered into as of October 25, 2021 illegal (but crucially do not impact non-solicitation clauses generally and non-competition clauses for non-employees, i.e. independent contractors).

Therefore, it is our opinion, that absent additional FSRA or RIBO guidance or a codification of the broader interpretation by RIBO, it is likely that the TAC Rule will be isolated to the tug-of-war that occurs when individual brokers move to new brokerages and that arguments that the TAC Rule prevents brokers from honouring restrictive covenants stretch the interpretation of the TAC Rule too far, as it applies to brokers. With that said, we are sure this will not end the debate, as a single customer complaint to RIBO focused squarely on the hindrance of such customer to obtain a personal auto policy from their desired broker, could expand RIBO enforcement.