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BULLETIN NO. 9-2004

TO: ALL LICENSED INSURERS, TRADE ASSOCIATIONS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AND OTHER INTERESTED PARTIES

FROM: ARKANSAS INSURANCE DEPARTMENT

SUBJECT: THE EFFECT OF NON-LICENSURE OF AGENTS/BROKERS ON INSURANCE CONTRACTS IN ARKANSAS

The Arkansas Insurance Department Legal Division has reviewed several complaints recently relating to the enforceability and regulatory action arising from sales of insurance policies, which were allegedly sold to Arkansas residents by insurance agents not licensed by the Arkansas Insurance Department ("Department") at the time of the sale of the policy. Insurance companies need to review the Department's jurisdiction statutes over agents (set out generally below), be aware of the consequences of unlicensed sales, and ensure the company has valid appointments with insurance producers/agents licensed by this Department for insurance policy sales in this state.

The Department also intends to clarify in this bulletin that, for insurance policies entered into after July 1, 2002, the analysis triggering the Department to require licensure over a person acting as an insurance producer/agent has changed in light of the "Producer Licensing Model Act," codified in Ark. Code Ann. §23-64-501, et seq.

For insurance contracts entered into before July 1, 2002, Ark. Code Ann. §23-64-201(a) states: "No person shall in this state act as or hold himself or herself out to be an agent, broker, consultant, or adjuster, as to subjects of insurance located, resident, or to be performed in this state unless then licensed for that purpose pursuant to this chapter." Historically, unless the activity is exempt from agency licensing under Ark. Code Ann. §23-64-202, the Department has taken the position that, in light of the clause in this subsection "as to subjects located, resident, or to be performed in this state," that, if the subject risk or activity insured is located in this state, the person selling the policy to the subject risk must be licensed by the Arkansas Insurance Department, regardless of the fact that the solicitations, negotiations, payments, or place of signature took place in another state. For example, for policies entered into before July 1, 2002, if the life insurance policy is sold to a person whose residence is in Arkansas, the person selling the policy is required to be licensed by the Department, even though the person selling the policy negotiated, solicited and had the policy signed in another state. The physical location of the subject risk or individual insured was therefore a dispositive fact to review whether the person selling the policy need be licensed by the Department under Ark. Code Ann. §23-64-201(a).

The jurisdictional tests over agency and insurance producer licensing, however, have changed for insurance contracts entered into after July 1, 2002. In such cases, the Producer Licensing Model Act ("Producer Licensing Act") in Ark. Code Ann. §23-64-501 et seq. and specifically in Ark. Code Ann. §23-64-503, states "a person shall not sell, solicit, or negotiate insurance in this state for any class or classes of insurance unless the person is licensed for that line of authority in accordance with this subchapter." The terms, "sell," "solicit," and "negotiate" are defined in the previous section in subsections §23-64-201(13), §23-64-201(14), and §23-64-201(11) respectively. Under this analysis, unless exempted from agency licensing under Ark. Code Ann. §23-64-504, the fact that the physical location of the insured or activity insured is located in Arkansas is not a controlling factor any longer in determining whether the person selling the policy need be licensed by the Department. Pursuant to Ark. Code Ann. §23-64-503, the location of the state in which negotiations, solicitations, and other sales activities took place, customary with the sales of insurance policies, would be relevant factors to review to determine whether agency or insurance producer licensure is required by this Department.

Insurers should note that the Department, in this bulletin, is addressing its jurisdiction on the licensure of producers/agents, brokers, or agencies by the Department, or persons who should be licensed, rather than specifying factors it will review in determining whether an insurer is required to have a certificate of authority to conduct business in this state under §23-63-201.

In the complaints on the issue of "unlicensed" insurance producer and agency sales reviewed by the Department, complainants have also suggested or requested that the Department rescind or declare "void" the policies sold by persons the Department finds were in violation of Ark. Code Ann. §23-64-201(a). Generally, the Department takes the position of deferring rescission or equitable relief requests to the courts, for "unlicensed" sales of insurance policies, and restricts its jurisdiction to determining whether there exists a regulatory violation under the Arkansas Insurance Code, for purposes of applying fines, misconduct penalties, or disciplinary orders on the person or insurer violating the Insurance Code.

Questions regarding this Bulletin should be directed to Booth Rand, Associate Counsel, at 501-371-2820 or e-mail questions to insurance.legal@arkansas.gov.

(signed by mike pickens)

(june 4, 2004)

MIKE PICKENS
INSURANCE COMMISSIONER

DATE