

Order 92-13

Proposed exemption of certain directors and officers management liability policies from the separate aggregate defense cost limit of acts 1987, no. 204 s 3

February 12, 1992

Now, on this the 12th day of February, 1992, the aforementioned matter comes on before Lee Douglass, Insurance Commissioner for the State of Arkansas. From the facts as presented to him, the said Commissioner does hereby FIND AS FOLLOWS:

1. That St. Paul Property and Liability Company has submitted for approval and issuance within the State of Arkansas its "Non-Profit Organization Management Liability Protection" Policy, on a claims-made basis, such policy bearing its Form No. 47126 Ed. 7-91.
2. That such policy form contains at page "2 of 7" its provision entitled "Right and Duty to Defend" which contains the following sentence:

And our duty to defend claims ends when we have used up the available limit of coverage with the payment of judgments, settlements or defense expenditures.

Such provisions cause the policy to be characterized as one which provides "defense within limits."

3. That under the provisions of Ark. Code Ann. s 23-79-307(5) it is stated that no policy may be approved for use within Arkansas if it contains provisions which would reduce the limit of liability available for judgments or settlements by the amount of payment made for defense cost or expense, i.e. "defense within limits," UNLESS a separate limit for defense costs equal to one hundred per cent (100%) of the annual aggregate liability for judgments or settlements is also offered or provided for defense costs and claims expenses.
4. While policy Form No. 47126 contains no such separate aggregate limit for defense costs and expenses, much of the Non-Profit Directors and Officers liability coverage currently available in the State fails to comply with such statute in any event and offer coverage on a "defense within limits" basis since it is issued by surplus lines carriers on a non-admitted, unregulated basis.
5. The separate aggregate limit for high defense cost liability lines such as non-profit organization management liability has not proved practicable with admitted carriers, as they believe it would be ill-advised to abandon defense of litigation when their defense cost is expired if their liability exposure is yet undetermined.

6. It is an important consideration that charitable and other non-profit entities be protected from management liabilities by admitted and fully regulated carriers such as St. Paul.

7. Because defense costs in D & O litigation most often exceed damages eventually awarded, it has been difficult to price the D & O product on the traditional defense without limits basis since the upper limit of exposure could not be reasonably and predictably calculated. This has resulted in a very limited admitted and regulated market for this type of coverage.

8. That the separate aggregate limit for defense cost and expenses may not be practically applied in the area of D & O management policies issued to non-profit entities, and, further, separate aggregate limits within this limited spectrum is not necessary or desirable for the protection of the public.

CONCLUSIONS OF LAW

1. That the Commissioner has authority to issue a limited order of exemption upon findings as above set forth.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. That it shall hereafter be no objection to the approval of a policy for non-profit organization management liability insurance on a claims made basis within Arkansas that it is issued on a "defense within limits" basis and that it does not offer or provide a separate aggregate limit for defense costs or expenses in an amount equal to the liability limit; PROVIDED, HOWEVER, that such exemption shall apply only to such policies issued with liability and defense limits of \$500,000.00 or more.

Lee Douglass
Insurance Commissioner
