

**BEFORE THE INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS**

**IN THE MATTER OF
PROPOSED EXEMPTION OF
TRAVELERS CYBER RISK/DATA BREACH
POLICY FROM THE SEPARATE DEFENSE COST
LIMITS OF ARK. CODE ANN. § 23-79-307(5),
SERFF FILING # TRVE-130402189**

RESPONDENT

A.I.D. NO. 2016- 073

ORDER

Now on this day, the aforementioned matter comes before Allen Kerr, Insurance Commissioner for the State of Arkansas (the “Commissioner”), and from the facts before him, as presented by Amanda Gibson, Associate Counsel for the Arkansas Insurance Department (“Department”), the Commissioner finds as follows:

FINDINGS OF FACT

1. Travelers has submitted for approval and issuance within the State of Arkansas, its Cyber Risk/Data Breach policy. The SERFF filing number associated with this submission is TRVE-130402189.
2. That such policy contains third party liability damages and defense expense. That this portion of the Cyber Risk/Data Breach policy contains defense within the limits of liability, where, if purchased, the limit for liability damages may be reduced or completely exhausted in payment of defense expenses.
3. That said provision, enabling the insurer to include the costs of defense within limits of its total claims liability, causes this policy to be characterized as one which provides “defense within limits.”

4. That under the terms of Ark. Code Ann. § 23-79-307(5), it is provided that no policy may be approved for use within Arkansas if it contains provisions that would reduce the limit of liability available for judgments or settlements by the amount of payments made for defense costs or expenses, i.e., “defense within limits”, UNLESS a separate limit for defense costs equal to one hundred percent (100%) of the annual aggregate liability for judgments or settlements is also offered or provided for defense costs and claim expenses.

5. That the separate aggregate limit for high defense costs liability lines such as pollution liability, attorney’s malpractice (securities oriented), nonprofit directors and officers management liability, media risk (defamation) liability, design professionals liability, employment practices liability, for profit directors and officers liability, bankers professional liability and insurance company errors and omissions liability has not proved practicable for insurers, as it places them in the untenable position in the course of litigation of having to determine whether they should abandon their defense when that limit is exhausted, but when their liability exposure is as yet undetermined.

6. That Cyber Risk/Data Breach policies are primarily purchased to cover restoration of equipment, data recovery, business interruption, and third party liability. Third party liability exposure often exceeds coverage provided, and it has been difficult to price such a product on the traditional defense without limits basis since the upper limit of exposure cannot be reasonably and predictably calculated. This has resulted in a very restricted market for this type of coverage, and further, separate aggregate limits within this limited spectrum are not necessary or desirable for the protection of the public. Also, with Cyber Risk/Data Breach policies, the third party liability coverage is usually optional and is chosen as the insured deems necessary, allowing smaller risks the affordability of such coverage.

7. That the policy of the Department continues to be that the public is best served if liability contracts are, in general, issued on a traditional “defense outside of limits” basis; it is therefore appropriate to limit the circumstances in which defense within limits contracts, such as that proposed in the instant matter, may be utilized.

CONCLUSIONS OF LAW

The Commissioner has authority to issue a limited order of exception upon findings as set forth above.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. That no insurer may issue any “defense within limits” Cyber Risk/Data Breach policy which contains third party liability within Arkansas unless:
 - a. Such policy is issued with liability and defense limits of \$500,000.00 or more;
 - b. The applicant for the policy (whether an individual or firm) has executed a “consent form” acknowledging his/her or its understanding that the subject policy has limits of liability which may be reduced or completely eliminated by payments for defense costs and claim expenses; and
 - c. The “consent form” noted above is made a part of the policy upon issuance.
2. That no Cyber Risk/Data Breach errors and omissions liability policy may be otherwise issued on a “defense within limits” basis without specific written approval of the Insurance Commissioner.

IT IS SO ORDERED this 1st day of August, 2016.



ALLEN KERR
INSURANCE COMMISSIONER
STATE OF ARKANSAS