BEFORE THE INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS

IN THE MATTER OF
PROPOSED EXEMPTION OF
CERTAIN FIDUCIARY LIABILITY AND TRUST
LIABILITY AGREEMENTS FROM
THE SEPARATE DEFENSE COST LIMITS
OF ARK. CODE ANN. § 23-79-307(5)(A) A.I.D. NO. 2003- 0108

ORDER

Now on this day the aforementioned matter comes before Mike Pickens, Insurance Commissioner for the State of Arkansas, and from the facts and other matters before him, as presented by Booth Rand, Associate Counsel for the Arkansas Insurance Department ("Department"), the Commissioner finds as follows:

FINDINGS OF FACT

1. That St. Paul Mercury Insurance Company ("St. Paul") has submitted to the Department for approval and issuance within the State of Arkansas its Fiduciary Liability and Trust Liability Insuring Agreements (the "Agreements") filed on or about September 10, 2003.

2. The Agreements include all defense costs within the limits of liability under the policies, set forth in the declarations. That such provisions, enabling the insurer to include the costs of defense within the limits of its total claim liability, causes the Agreements to be characterized as those which provide "defense within limits."

3. Under Ark. Code Ann. § 23-79-307(5)(A), no liability policy may be approved for use within this State if it contains provisions which would reduce the limit of liability available for judgments or settlements by the amount of payments made for defense costs or expenses, 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.

4. That the separate aggregate limit for high defense cost liability lines such as pollution liability, attorney's malpractice (securities oriented), non-profit directors and officers management liability, media risk (defamation) liability, design professionals liability, employment practices liability, for-profit directors and officers liability and bankers professional 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 "used up" but when their liability exposure is as yet undetermined.

5. That because defense costs in trust liability and fiduciary liability litigation often exceed damages awarded, it has been difficult to price such products 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 restricted market for this type of coverage, and further, separate aggregate limits within this limited spectrum is not necessary or desirable for the protection of the public. Under such circumstances and background, this Order is issued pursuant to the Commissioner's exemption authority contained in Ark. Code Ann. §23-79-307(5)(B) and is also in conformity with previous Orders issued by the Commissioner under AID Order # 98-5, AID Order # 99-368, and Order 2000-169.

6. That the policy of the Department continues to be that the public is best served if the aforementioned Agreements or policies 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

That in accordance with Ark. Code Ann. §23-79-307(5)(B) 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" fiduciary liability and trust liability agreements or policies within Arkansas unless:

a. such policy or agreement is issued with liability and defense limits of $1,000,000 or more;

b. the applicant for the policy (whether individual or firm) has executed a "Consent Form" acknowledging his or its understanding that the subject policy has limits of liability which may be reduced or completely eliminated by payments for defense costs and claims expenses; and

c. the "Consent Form" noted above is made a part of the policy upon issuance.

2. That no fiduciary liability and trust liability agreements may be otherwise issued on a "defense within limits" basis without specific written approval of the Insurance Commissioner.

IT IS SO ORDERED THIS 29th day of October 2003.

MIKE PICKENS
INSURANCE COMMISSIONER
STATE OF ARKANSAS