

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

**IN THE MATTER OF PROPOSED  
EXEMPTION OF CERTAIN ABUSE  
OR MOLESTATION LIABILITY  
POLICIES FROM THE SEPARATE  
DEFENSE COST LIMITS OF  
ARKANSAS CODE ANNOTATED  
§23-79-307(5)**

**A.I.D. NO. 2013- 093**

**EXEMPTION ORDER**

On this day, the petition of Federal Insurance Company for an exemption from the defense outside liability limits and separate limit of defense requirements for its Abuse or Molestation Liability Claims-Made and Reported policy comes before Jay Bradford, Arkansas Insurance Commissioner (“Commissioner”). The Arkansas Insurance Department (“Department”) is represented by Amanda J. Andrews, Associate Counsel, in this matter. From the facts and law before the Commissioner, he finds as follows:

**FINDINGS OF FACT**

1. Federal Insurance Company submitted for approval and issuance within the State of Arkansas its Abuse or Molestation Liability Claims-Made and Reported policy (“abuse or molestation liability”).

2. The policy section titled “Payments That Reduce The Limits Of Insurance,” page 9, states:

Any payments we make for any of the following will reduce the Limits of Insurance:

- claim adjustment expenses
- claimant costs
- damages

3. The foregoing provision, enabling the insurer to include the costs of defense within the limits of its total claim liability, causes this policy to be characterized as one which provides "defense within limits."

4. On April 26, 2013, Federal Insurance Company submitted its request, pursuant to Arkansas Code Annotated § 23-79-307(5)(B), to exempt its abuse or molestation liability policy from the prohibition against "defense within limits" on the grounds that:

The characteristics of abuse or molestation claims that speak to the need for alternatives to traditional occurrence/defense outside limit treatment include:

- Severity potential of claims
- Skyrocketing defense costs and lengthy litigation resulting in defense costs far exceeding damages payable under an insurance policy
- Latency potential of claims due to the age of certain victims of abuse or molestation

#### **CONCLUSIONS OF LAW**

5. The Commissioner has jurisdiction over the parties and the subject matter pursuant to Arkansas Code Annotated §§ 23-61-103 and 23-79-307(5)(B).

6. Arkansas Code Annotated § 23-79-307(5)(A) states that no liability 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 payments made for defense cost or expenses, i.e. "defense within limits," unless a separate limit for defense costs equal to one hundred percent (100%) of the annual aggregate limit of liability stated in the policy for judgments or settlements is offered for defense costs or claims expenses to the insured.

7. The Commissioner may exempt a policy or contract from the prohibition against “defense within limits” upon a finding that Arkansas Code Annotated § 23-79-307(5)(A) cannot practically be applied or that its application is not necessary or desirable for the protection of the public. Ark. Code Ann. § 23-79-307(5)(B).

8. The separate aggregate limit for high defense cost liability lines, such as abuse or molestation 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,” though their liability exposure has not yet determined.

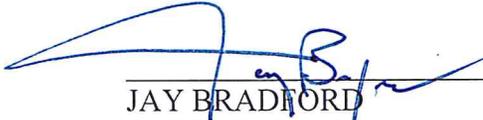
9. Because defense costs in abuse or molestation litigation often exceed damages awarded, it has been difficult to price the abuse or molestation product on the traditional defense without limits basis since the upper limit of exposure could not be reasonably and predictably calculated, resulting in a very restricted market for such coverage. Further, separate aggregate limits within this limited spectrum are not necessary or desirable for the protection of the public.

10. The policy of the Department continues to be that the public is best served if liability contracts are, generally, 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 the policy proposed in the present matter, may be utilized, and the Commissioner has the authority to issue a limited order of exception upon findings as set forth above.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. No insurer may issue any "defense within limits" abuse or molestation liability policy within Arkansas unless:
  - a. The policy is issued with liability and defense limits of \$1,000,000 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 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" is made a part of the policy upon issuance.
2. No abuse or molestation 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 1<sup>st</sup> day of October, 2013.

  
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JAY BRADFORD  
INSURANCE COMMISSIONER  
STATE OF ARKANSAS