

Order 96-194

Issuance of defense within limits employment practices liability policy

July 27, 1996

ORDER

Now on this day the aforementioned matter comes before Lee Douglass, Insurance Commissioner for the State of Arkansas and from the facts as presented by Roger McNeil, Associate Counsel for the Commissioner, and being well-advised in the premises, the Commissioner does hereby FIND AS FOLLOWS:

1. That Cincinnati Insurance Company has submitted for approval and issuance within the State of Arkansas its "Employment Practices" liability policy.
2. That such policy contains at Section III "Limits of Insurance and Insured's Deductible and Coinsurance," paragraph 3, the following language:

Defense costs incurred by us or by the insured with our written consent are part of and not in addition to the Limits of Insurance specified in the Declarations. Our payment of defense costs reduces the Limits of Insurance.

3. That said 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. That under the terms of Ark. Code Ann. s 23-79-307(5) it is provided 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 liability for judgments or settlements is also offered or provided for defense costs and claims expenses.
5. That the separate aggregate limit for high defense cost liability lines such as pollution liability, attorney's malpractice (securities oriented), non-profit organization management liability, defamation liability and employment practices 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.
6. That because defense costs in employment practices litigation often exceed damages awarded, it has been difficult to price the employment practices 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 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.

7. That the policy of the Insurance 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

That 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" employment practices liability policy within Arkansas unless;
 - a. such policy is issued with liability and defense limits of \$500,000 or more;
 - b. the applicant for the policy (whether an 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 employment practices liability policy may be otherwise issued on a "defense within limits" basis without specific written approval of the Insurance Commissioner.

Lee Douglass
Insurance Commissioner
