

Order 94-253

Proposed exemption of certain "design professionals" (architects and engineers) professional liability policies from the separate defense cost limit of act 1987, no. 204, s 3

June 22, 1994

NOW, on this the 22nd day of June, 1994, the aforementioned matter comes on before Lee Douglass, Insurance Commissioner for the State of Arkansas, and from the facts as presented to him, and being well-advised in the premises, the said Commissioner does hereby FIND AS FOLLOWS:

1. That Continental Casualty Company has submitted for approval and issuance within the State of Arkansas its "Design Professionals" (architects and engineers) professional liability policy.

2. That such policy contains at paragraphs I.D. "Coverage Agreements" and III.B. "Limits of Liability" the following language:

I.D. We will be obligated to defend any suit or pay any claim or claim expenses after the applicable limit of our liability has been exhausted by payment of claim or claim expenses.

II.B. Claims expenses are subject to and included within the applicable limit of liability.

The term "claims expenses" is, further, defined at paragraph IV of the proposed policy form so as to include within its scope any and all fees and costs of any description whatsoever that might be incurred by the insurer in defending the interests of the insured as a result of a "claim."

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 expense, 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 attorneys malpractice (securities oriented), non-profit organization management liability, pollution

liability, defamation liability, and professional liability of architects and engineers 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 this factor has resulted in a restriction of the liability insurance market in coverage of professional liability for architects and engineers, which is a market where history demonstrates that defense costs often greatly exceed the amount of damages awarded; and, further, it is an important consideration that all architects and engineers have access to professional liability insurance at competitive rates and from the admitted market.

7. That the separate aggregate limit for defense costs and expenses may not be practically applied in the area of professional liability policies issued to architects and engineers, and, further, separate aggregate limits within this limited spectrum is not necessary or desirable for the protection of the public at large.

8. That, by definition, architects and engineers are "professionals" and readily capable of comprehending the additional risks inherent to them if they elect to purchase a liability policy issued on a "defense within limits" basis; it is important, nonetheless, that the insurer issuing such contracts take all such steps as are reasonable to make certain that this departure from traditional "defense outside limits" is brought to the attention of the architect or engineer insured; it is appropriate, therefore, to limit the circumstances and the persons or entities to whom such 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 above set forth.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. That no insurer may issue any "defense within limits" professional liability policy within Arkansas to any architect or engineer unless:
 - a. the individual architect or engineer or the firm (partnership or corporation) to be insured shall hold a current license or registration as an "architect" under A.C.A. ss 17-14-301, et seq. or as "engineer" under A.C.A. ss 17-27-101, et seq.; and
 - 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 architects or engineers professional liability policy may be otherwise issued on a "defense within limits" basis without specific written approval of the Insurance Commissioner, his Deputy or Assistant.

Dated this 22nd day of June, 1994.

Lee Douglass
Insurance Commissioner
