

BEFORE THE INSURANCE COMMISSIONER

STATE OF ARKANSAS

IN THE MATTER OF  
PROPOSED EXEMPTION OF CERTAIN  
"MEDIA RISK" (Defamation) LIABILITY  
POLICIES FROM THE SEPARATE DEFENSE  
COST LIMIT OF ACTS 1987, No. 204, §3

A.I.D. NO. 94-3

ORDER

NOW, on this the 2<sup>nd</sup> day of January, 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 the Employers of Wausau Insurance Company has submitted for approval and issuance within the State of Arkansas its "Media Special Perils Program" defamation (libel/slander) liability policy.

2. That such policy contains within its "Limit of Liability" section the following language of limitation, viz:

A. Each occurrence:

Regardless of the number of:

1. insureds under the policy;
2. publication, advertisements or distribution;
3. policies issued by the Company;
4. persons or organizations who sustain injury; or
5. claims made or suits brought on account of injury; the

Company's Limit of Liability for all loss and claim expense shall not exceed the amount stated in the Declarations as respects "each occurrence."

(emphasis added)

Further, at paragraph XV the said policy provides that the term "Claim Expense" means:

"1. Fees charged by an attorney in defense of a claim, including legal expenses necessitated by a demand for a retraction or correction; and

2. All other fees, costs and expenses which result from the investigation, discovery, adjustment, defense, settlement or appeal of a claim.

"Claim expense" does not include salary charges or expenses of regular employees of the insured or the Company, any company officials or fees and expenses of independent adjusters."

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. §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 per cent (100%) of the annual aggregate liability for judgments or settlements is also offered or provided for defense costs and claims expenses.

5. The separate aggregate limit for high defense cost liability lines such as attorneys malpractice (securities oriented), non-profit organization management liability and defamation 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. This factor has resulted in a restriction of the liability insurance market in the high risk defamation area, which is one where, traditionally, the defense costs greatly exceed the amount of damages awarded or legitimately at issue; and, further, it is an important consideration that all types of media providers be protected from defamation liabilities, or an artificial disincentive to free speech would be created.

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

8. 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" ("DOL") basis; it is therefore, appropriate to limit the circumstances in which defense within limits contract such as that proposed in the instant matter may be utilized.

9. That the Commissioner believes that certain practical guidelines may be set forth which will guide liability insurers as to which insureds they may routinely issue contracts on a defense within limits basis, and that, also, it should be understood that specific case by case approval by the Commissioner will be required as to the issuance of any media-risk contracts on a defense within limits which do not fit within the specific parameters below.

#### CONCLUSIONS OF LAW

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

IT IS THEREFORE ORDERED AS FOLLOWS;

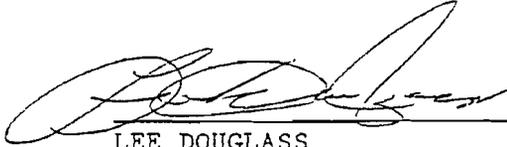
1. That ANY INSURER writing liability coverages for the media risk of defamation may issue such coverages on a non-traditional "defense within limits" ("DWL") basis if the entity or entities being insured meets any one or more of the following criteria, i.e., the entity(ies):

- a) had annual revenues, sales or receipts of of \$10,000,000.00 or more in its most recently-concluded fiscal year;
- b) has incurred adverse loss history within the previous five years in which defense costs (attorneys fees and expenses, including expert witnesses) have exceeded \$250,000.00;
- c) if a Book Publisher, has published 50 or more new titles in its most recently-concluded fiscal year;
- d) if an advertising agency, has generated \$750,000.00 or more in gross billings in its most recently-concluded fiscal year;
- e) if a daily newspaper, has an average daily circulation of 100,000 or more;
- f) if a weekly newspaper, has an average weekly circulation of 250,000 or more;
- g) if a magazine or newsletter, has 100,000 or more weekly or monthly circulation;
- h) if a television station, if it is network owned or operated by a national or nationwide network or has annual gross revenues, or income of \$10,000,000.00 or more in its most recently-concluded fiscal year;
- i) if a radio station, if it is network owned or operated by a national or nationwide network or has annual revenues, sales or receipts of \$1,000,000.00 or more in its most recently-concluded fiscal year; and

j) if a cable television system, has 100,000 or more subscribers.

2. That no media risk defamation 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 27<sup>th</sup> day of January, 1994.



LEE DOUGLASS  
INSURANCE COMMISSIONER  
STATE OF ARKANSAS