ALAN WILSON
ATTORNEY GENERAL

November 01, 2022

Gwendolyn Fuller McGriff, Esq.
Deputy Director and General Counsel
South Carolina Department of Insurance
PO Box 100105
Columbia, SC 29202-3105

Dear Ms. McGriff,

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> As you may be aware, the Director of Insurance is the statutory agent for service of process for insurers transacting business in South Carolina. I am writing to seek legal advice from your office regarding the Department's interpretation about what constitutes "process" for purposes of service of process on insurers transacting business in this state. At issue is the interpretation of S.C. Code Ann. §§ 38-5-70 and 15-9-270 regarding the service of third-party subpoenas. The Department has forwarded subpoenas in the past when attached to the summons and complaint. Around 2020, the Department served some subpoenas (primarily in the context of a receivership proceeding) without regard to the content of the document, but when it started receiving hundreds of nonparty subpoenas in a various types of cases, it took a closer look at the statute(s) and notified the attorneys that it could not serve third party subpoenas because they were not the type of process contemplated by Sections 38-5-70 and 15-9-270. Based on the language of the statute and applicable case law, this Department determined that legal process included the summons and complaint and other documents which initiated the cause of action against the insurer.
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> ...
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> As previously stated, the Department's interpretation is based on its preliminary research which indicates third party subpoenas are not the type of process contemplated by the statutes. The plain meaning and purpose of Sections 38-5-70 and 15-9-270 indicates that nonparty subpoenas do not fall within the type of process described in the statute.

Specifically, S.C. Code Ann. § 38-5-70 provides:

> Every insurer shall, before being licensed, appoint in writing the director and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it must be served and in this writing shall agree that any lawful process against it which is served upon this attorney is of the same legal force and validity as if served upon the insurer and that the authority continues in force so long as any liability remains outstanding in the State. Copies of the appointment, certified by the director, are sufficient evidence of the appointment and must be admitted in evidence with the same force and effect as the original might be admitted.

S.C. Code Ann. § 38-5-70 (2015) (emphasis added).

Section 38-5-70 addresses the appointment of the Director of Insurance as the insurer's statutory agent for service of process. Because the statute requires the appointment of the Director, courts have concluded that the Director serves as the statutory agent of the insurers in the state, making service upon the Director sufficient service upon the company. See, e.g., Elliott v. American States Insurance Company, 883 F.3d 884 (2018) (statute appointing commissioner for service of process made the commissioner the statutory agent not the registered agent).

S.C. Code § 15-9-270 addresses the procedure for service of process:

> The summons and any other legal process in any action or proceeding against it must be served on an insurance company as defined in Section 38-1-20, including fraternal benefit associations, by delivering two copies of the summons or any other legal process to the Director of the Department of Insurance, as attorney of the company with a fee of ten dollars, of which five dollars must be retained by the director to offset the costs he incurs in service of process and of which five dollars must be deposited to the credit of the general fund of the State. A company shall appoint the director as its attorney pursuant to the provisions of Section 38-5-70. This service is considered sufficient service upon the company. When legal process against any company with the fee provided in this section is served upon the director, he shall immediately forward by registered or certified mail one of the duplicate copies prepaid directed toward the company at its home office or, in the case of a

> fraternal benefit association, to its secretary or corresponding officer at the head of the association.

S.C. Code Ann. § 15-9-270 (2015) (emphasis added).

Black's Law Dictionary defines "process" as "1. The proceedings in any action or prosecution <due process of law>. 2. A summons or writ, esp. to appear or respond in court <service of process>. Also termed judicial process; legal process." Black's Law Dictionary 1399 (10th ed. 2014). Therefore, process is generally defined as the summons and complaint, writ or other pleading that initiates a court action against an insurer or that requires a court appearance or response in an action against the insurer.

The Department does not contend subpoenas do not constitute process but instead contends subpoenas are not the type of process that was envisioned by the statute. The plain language of S.C. Code Ann. §§ 15-9-270 and 38-5-70 only requires and/or authorizes the Director to serve "process," such as a summons and complaint, writ, or other case initiating document, etc., on an insurance company **in an action or proceeding against it**. Neither S.C. Code Ann. § 38-5-70 nor § 15-9-270 require the Department or its director to serve subpoenas on non-party insurers. Subpoenas do not confer personal jurisdiction and are not the type of process contemplated by Sections 38-5-70 or 15-9-270. Moreover, South Carolina courts have opined that process constitutes case-initiating documents such as the summons and complaint or a writ that initiates a judicial proceeding. See Equilease Corp. v. Weathers, 275 S.C. 478, 272 S.E.2d 789 (1980); White Oak Manor, Inc. v. Lexington Insurance Co., et. al, 407 S.C. 1, 753 S.E.2d 537 (2014). Third/nonparty subpoenas are not case-initiating documents.

Law/Analysis

It is this Office's opinion that a court would likely find the language used in S.C. Code §§ 15-9-270 and 38-5-70 is broad enough to include subpoenas within the types of process that are subject to the substituted service procedures thereunder. This Office has not identified a decision from our state courts interpreting whether third-party subpoenas are included within the types of process that are subject to substitute service under S.C. Code §§ 15-9-270 and 38-5-70. As this appears to be a matter of first impression, it should be emphasized that the General Assembly's intent is the primary consideration in interpreting the terms of a statute. See Kerr v. Richland Mem'l Hosp., 383 S.C. 146,148, 678 S.E.2d 809, 811 (2009) (The primary rule of statutory construction is to "ascertain and give effect to the intent of the legislature."). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015),

reh'g denied (Aug. 5, 2015). With these principles in mind, this opinion will next examine the language of both section 15-9-270 and 38-5-70 to ascertain legislative intent.

The two statutes work in tandem to permit substitution of service for insurance companies on the Director of the Department of Insurance ("the Director"). Section 38-5-70 contains language suggesting intent for broad application for service of process.

> Every insurer shall, before being licensed, appoint in writing the director and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it must be served and in this writing shall agree that any lawful process against it which is served upon this attorney is of the same legal force and validity as if served upon the insurer.

S.C. Code Ann. § 38-5-70 (emphasis added). The statute's use of "all" and "any" suggests the Legislature intended for this substitute service to apply to a wide range of legal process. However, in both instances, the statute also denotes that the action, proceeding, or process must be "against it," meaning the insurer. Id. Section 15-9-270 similarly employs expansive language to describe process, "any other legal process," and it maintains the same limitation that the process be "against it."

> The summons and any other legal process in any action or proceeding against it must be served on an insurance company ... by delivering two copies of the summons or any other legal process to the Director of the Department of Insurance, as attorney of the company .... A company shall appoint the director as its attorney pursuant to the provisions of Section 38-5-70. This service is considered sufficient service upon the company. ...

S.C. Code Ann. § 15-9-270 (emphasis added). As noted in your letter above, Black's Law Dictionary defines "process" to include "[a] summons or writ, esp. to appear or respond in court." PROCESS, Black's Law Dictionary (11th ed. 2019) (emphasis added). Black's Law Dictionary also defines "subpoena" as "[a] writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply." SUBPOENA, Black's Law Dictionary (11th ed. 2019) (emphasis added). Because a subpoena is a type of writ and writs are included within the definition of process, a subpoena is a type of legal process.

Although a subpoena is a legal process, it may not be of the kind the Legislature intended to be covered by these substitute service statutes. See AARP v. Am. Fam. Prepaid Legal Corp., No. 06 CVS 10216, 2007 WL 2570841, at *5 (N.C. Super. Feb. 23, 2007) ("The Court has no quarrel with AARP's unremarkable assertion that '[a] subpoena is a process[.]' ... But, it is quite another thing to say that a subpoena is the type of process that may properly be served on a non-party insurer pursuant to" the North Carolina substitution of service statutes.). In Equilease Corporation v. Weathers, 275 S.C. 478, 272 S.E.2d 789 (1980), the South Carolina Supreme Court considered whether an earlier version of the substitute service statutes permitted service of a summons and cross-complaint on the Chief Insurance Commissioner rather than a foreign

insurer's attorneys of record. Therein, counsel for co-defendants argued that "after jurisdiction had already been acquired over [insurer], substituted service statutes of the Code were no longer applicable..." Id. at 483, 272 S.E.2d at 791. The Court agreed stating:

> This reasoning is logical and practical and it is clear that Code Sections 15-9-270 and 38-52-80 [currently codified as 38-5-70] were intended by the legislature to be methods of obtaining jurisdiction over a foreign insurance company. Once jurisdiction has been acquired over such an insurance company, these code sections have no further applicability. Any other construction of these statutes would lead to ridiculous results if taken to their logical conclusion, such as allowing service of notices of depositions, interrogatories, motions, et cetera, on the Chief Insurance Commissioner.

Id. at 483–84, 272 S.E.2d at 791. The Court explained that, at the time of its opinion, "where jurisdiction has not yet been acquired over an insurance company, service under the applicable substituted service statute is the proper and exclusive method of obtaining jurisdiction over the insurance company." Id. at 484, 272 S.E.2d at 792.[1] The Court's statements regarding sections 15-9-270 and 38-5-70 plainly support substitution of service on the Director to obtain jurisdiction over an insurer. In contrast, substitution of service could not be used to serve notice of depositions and other discovery after obtaining jurisdiction.

Your letter raises the additional issue of whether the substitute service procedures in sections 15-9-270 and 38-5-70 could be used to obtain discovery from a third-party foreign insurance company when a state court does not yet have jurisdiction. As discussed above, the plain language of the statutes broadly authorizes substitute service of "all" or "any" legal process "against" an insurer. S.C. Code Ann. §§ 15-9-270, 38-5-70. It is unclear, however, whether a court would find the language "action or proceeding against it" demonstrates legislative intent to authorize substitute service of a subpoena upon an insurer when it is a third-party or non-party. Id.

Nevertheless, there is a separate statutory scheme that specifically authorizes depositions and discovery from foreign sources. A majority of states have enacted a standardized method for taking depositions and obtaining discovery from individuals and entities located out of state. In 2010, the General Assembly adopted the Uniform Interstate Depositions and Discovery Act ("UIDDA"), S. C. Code Ann. § 15–47–100 *et seq.*

> The Act sets forth procedures for the request, issuance, contents, and service of foreign subpoenas, as well as for application to the court for a protective order or to enforce, quash, or modify such a subpoena. The Act further provides that when a subpoena issued thereunder commands a person to attend and give testimony at

[1] While both sections 15-9-270 and 38-5-70 have been amended since Equilease, the Court has subsequently maintained the Legislature's intent in adopting and amending these statutes was "to provide an insured with a method to obtain service of process on insurance companies." White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 9, 753 S.E.2d 537, 541 (2014).

> a deposition, produce designated books, documents, records, electronically stored information, or tangible items, or permit inspection of premises, the time and place and the manner of the taking of the deposition, the production, or the inspection must comply with the South Carolina Rules of Civil Procedure relating to discovery.

32 S.C. Jur. Witnesses § 4; see also Hawkins v. Blair, 334 Ga. App. 898, 902–03, 780 S.E.2d 515, 519 (2015) ("[B]oth South Carolina and Georgia have enacted a version of the Uniform Interstate Depositions and Discovery Act. See OCGA § 24–13–110 *et seq.* and S. C. Code Ann. § 15–47–100 *et seq.*, which allows discovery as indicated in the title of the Act."). If a foreign insurer is subject to jurisdiction within a state that has likewise adopted the UIDDA, a subpoena could be served upon it as directed thereunder.

Conclusion

It is this Office's opinion that a court would likely find the language used in S.C. Code §§ 15-9-270 and 38-5-70 is broad enough to include subpoenas within the types of process that are subject to the substituted service procedures thereunder. This Office has not identified a decision from our state courts interpreting whether third-party subpoenas are included within the types of process that are subject to these substitute service statutes. The plain language of the statutes authorizes substitute service of "all" or "any" legal process "against" an insurer. S.C. Code Ann. §§ 15-9-270, 38-5-70. It is unclear, however, whether a court would find the language "action or proceeding against it" demonstrates legislative intent to authorize substitute service of a subpoena upon an insurer when it is a third-party or non-party. Id. Legislative clarification may be warranted regarding whether sections 15-9-270 and 38-5-70 are intended to authorize substitute service of subpoenas upon third-party insurers. While legislative clarification is probably advisable, we recommend your agency act in accordance with the present broad language of the statute until such clarification is adopted.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General