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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

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Gwen Fuller McGriff, Deputy Director
and General Counsel
South Carolina Department of Insurance
P.O. Box 100105
Columbia, South Carolina 29202-3105

Dear Ms. McGriff:

You have requested our opinion as to whether S.C. Code Ann. Section 38-5-80 (k) gives the Director of Insurance the authority to permit insurers interested in redomesticating or becoming licensed as a South Carolina domestic insurer to maintain its offices or principal operations outside the State of South Carolina. By way of background, you have submitted a legal memorandum which concludes that "the authority to allow a company to maintain operations outside of the state is incidental or collateral to the authority to allow companies to move operations and records outside the state." We concur with your analysis.

Law / Analysis

S.C. Code Ann. Section 38-5-80 provides for the Director of Department of Insurance or his designee to grant "the original certificate of authority or license to a domestic insurer to do business in this State," based upon certain specified criteria. Among these criteria is the requirement contained in § 38-5-80 (k) which provides as follows:

> [t]he insurer's principal place of business and primary executive, administrative, and home offices and all original books and records of the insurer are located and maintained in this State. The provisions of this subsection apply to domestic health maintenance organizations. For purposes of this section, original books and records mean corporate bylaws, charters, articles of incorporation, and any other records deemed to constitute original records by the director or his designee. Insurers desiring to move business records or operations outside of the State shall apply to the director or his designee for approval. Approvals or denials of request to move records or operations fall within the discretion of the director or his designee. The director may also rescind approval of a request if in his discretion it is considered to be in the best interest of the consumers and citizens of the State. Insurers must comply with the records requirements of Section 38-5-190 and the requirements for

> domestic insurers set forth in this chapter. The director or his designee shall outline via bulletin or order the information required in such an application. Item (K) of this section does not apply to any domestic insurer whose primary executive, administrative, and home offices were located outside this State on July 1, 1987. If subsequently the director or his designee is of the opinion that a condition exists which would have prohibited him from issuing the original certificate of authority or license to the insurer, then that condition also constitutes a ground for license revocation under Section 38-5-120. (emphasis added).

Thus, the essence of your question is whether the authority of the Director to approve domestic insurers "desiring to move business records or operations outside of the State" would also impliedly include those insurers which maintain operations outside of the State. We concur with your conclusion that such approval power is impliedly authorized.

Several principles of statutory construction are pertinent to your inquiry. First and foremost, is the cardinal rule of construction that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). However, the Court has cautioned against an overly literal interpretation of a statute which may not be consistent with legislative intent. Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). As stated by our Supreme Court in Bearden,

> [i]t is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words.

Id. at 368-369. A sensible construction, rather than one which leads to irrational results, is always warranted. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Moreover, we have also recognized that "[g]overnmental agencies ... can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly, inherently, or impliedly." Op. S.C. Atty. Gen., September 9, 2002; Op. S.C. Atty. Gen., January 8, 1999; Op. S.C. Atty. Gen., September 22, 1988. Likewise, as was observed in Medical Society of S.C. v. MUSC, 334 S.C. 270, 513 S.E.2d 352, 355 (1999), "[a]n agency created by statute has only the authority granted it by the legislature." [Citing Nucor Steel v. S.C. Pub. Ser. Comm., 310 S.C. 539, 426 S.E.2d 319 (1992).

Specifically, this rule that an agency possesses only such powers expressly or impliedly granted it by statute has been held to be applicable to the Department of Insurance. For example, it was stated by our Supreme Court in Independence Ins. Co. v. Independent Life and Acc. Ins. Co., 218 S.C. 22, 61 S.E.2d 399 (1950) that "... the power of the [Insurance] Commissioner is derived solely from the statutes. To them alone we look for his authority and jurisdiction." 61 S.E.2d at 402.

On the other hand, the Court has recognized the implied authority of the Insurance Commissioner in certain instances. In Mungo v. Smith, 289 S.C. 560, 347 S.E.2d 514 (1986), the Court of Appeals held that the authority to "designate" producers for the Reinsurance Facility included the implied authority to withdraw such designation. In that case, the Court reasoned as follows:

> [b]ecause of shifting demographic changes which are continually occurring in urban areas, both the availability of insurance agency contracts and the market need for the Reinsurance Facility constantly change. Coincidence with the right to employ is the right to discharge if there is no further need for the employment. We hold this to be an implicit right of the Insurance Commissioner with respect to the revocation of the designation of producers for the Reinsurance Facility.

289 S.C. at 571.

The provision authorizing the Director of the Department of Insurance or his designee to approve domestic insurers who move operations out of state was enacted in 2001 as Act No. 82. Previously, § 38-5-80 (k) required that "[t]he insurer's principal place of business and primary executive, administrative and home offices and all original books and records of the insurer are located and maintained in this State." However, in Act 82 of 2001 this requirement was relaxed somewhat by authorizing application to the Director for insurers "to move business records or operations outside of the State" at the "discretion of the director or his designee." In this same amendment, authority was also bestowed upon the Director to rescind approval of a request "if in his discretion it is considered to be in the best interest of the consumers and citizens of the State."

Thus, the question presented here is whether § 38-5-80 (k), as amended by the 2001 Act No. 82, impliedly authorizes the Director of Insurance to grant a certificate of authority as a domestic insurer to maintain its primary, executive and administrative offices outside the State. It first must be noted that the 2001 amendment authorized the Director to approve an insurer which moves its "operations" to another jurisdiction. This raises the question whether a company's "operations" corresponds to its primary executive and administrative home offices as used in the first sentence of § 38-5-80 (k).

The term "operations" with respect to a company or corporation is broadly defined. The American College Dictionary, (3d ed.) defines "operations" as "the division of an organization that carries out the major planning and operating functions." The source Dictionary.com – an online

dictionary – similarly defines the term. Likewise, Merriam-Webster Online Dictionary notes that "operations"consist of "the agency of an organization charged with carrying on the principal planning and operating functions of a headquarters and its subordinate units." Thus, as you conclude in your Memorandum, these definitions appear to encompass the primary, executive and administrative offices of an insurer. Accordingly, with the enactment of Act No. 82 of 2001, the General Assembly has authorized the Director to approve through the exercise of his discretion, the relocation of the primary, executive and administrative offices of domestic insurers to another State.

You make the argument in your Memorandum that the express authority to authorize a company to move its records and operations out of South Carolina carries with it the implied or collateral authority to allow companies to maintain "operations" (i.e. primary, executive and administrative offices) in a foreign jurisdiction. We agree.

It is important here to remember that the purpose of the General Assembly in enacting Act No. 82 of 2001, was to provide broad flexibility to the Director in order to permit some domestic insurers' operations and records to be located outside of South Carolina. As we understand it, the empowerment of the Director in this regard will have the effect of promoting economic development in South Carolina. You indicate that an effort has been underway for sometime to recruit insurers to the State of South Carolina in order to build the financial services industry in this State. You further note that some insurers wish to redomesticate to the State because the premium tax rate here is lower than in other regulatory jurisdictions.

Section 38-5-80 sets forth the requirements of becoming a domestic insurer in South Carolina, that is, "an insurer incorporated or organized under the laws of this State." §38-1-20 (7). Subsection (k) is one such requirement. As you note, this provision was amended by Act No. 82 of 2001 as part of the effort to promote the financial services industry in South Carolina by authorizing the Director to approve domestic insurer's "operations" being located outside the State.

We believe the Legislature's purpose in enacting Act No. 82 of 2001 would be deemed by a court to be controlling in resolving your question. Notwithstanding the literal language of Act No. 82 – which authorizes the approval of domestic insurers to "move records or operations outside of the State ...," this legislative intent – that the Director may approve a company using its "operations" in another jurisdiction – must be deemed to be paramount.

In our view, the issue of statutory construction is controlled by the Court's analysis in Greenville Baseball, Inc. v. Bearden, supra. In our opinion, "a thing which is the intention of the makers of a statute is as much within the statute as if it were within the letter." Thus, it is reasonable to glean from the Legislature's intent in enacting Act No. 82 or 2001 that the Director is authorized to approve as a domestic insurer a company which maintains its operations outside the State.

Moreover, as you indicate, implied authority embraces authority to do those acts which are incidental to, or are necessary, usual and proper to accomplish or perform the main authority

expressly delegated. Oftentimes, our courts will conclude that an agency or regulatory body possesses not only th express authority conferred upon it but those powers which are necessarily inferred or implied in order for the entity to effectively carry out the duties with which it is charged. See, City of Cola. v. Bd. of Health and Environmental Control, 292 S.C. 199, 355 S.E.2d 536 (1987).

Our Supreme Court concluded that the Director of the Insurance Department possesses certain implied authority in Hamm v. Central States Health and Life Insurance Company, 299 S. C. 500, 386 S.E.2d 250 (1989). In Hamm, the Court concluded that the Commissioner's duty to supervise and regulate rates implies the authority for the Commissioner to make refunds. The Court found that the duty to regulate rates implicitly bestows each and evert reasonable means necessary to execute such power.

Likewise, it is our opinion here that the power delegated to the Director by § 38-5-80 (k) to approve or deny an application to move records and operations of domestic insurers outside the state impliedly gives the Director authority to allow an insurer seeking a certificate of authority to transact business as a domestic insurer while maintaining its operations outside the State. The Director is given broad discretion to rescind approval of an application to operate as a domestic insurer if he determines that such operation is not in the public interest. Moreover, in our view, the power to allow a company to more operations would also include the collateral discretion to allow a company to maintain its operations in another jurisdiction.

Conclusion

Accordingly, we concur in your conclusion set forth in your Memorandum that the Director of Insurance possesses the implied power to allow an insurer seeking a certificate of authority to transact business as a domestic insurer while maintaining its operations outside the State of South Carolina.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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