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ATTORNEY GENERAL

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The Honorable David L. Thomas
Member, South Carolina Senate
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Dear Senator Thomas and Ms. McGriff:

Initially, we received a letter from Ms. McGriff requesting an opinion of this Office on behalf of the South Carolina Department of Insurance addressing coverage requirements for autism spectrum disorder by "group health insurance issued to employers outside of the state of South Carolina when those policies cover residents of this state." Subsequently, we received a request from Senator Thomas on this same issue. Thus, we will address whether or not section 38-71-280 of the South Carolina Code mandates that insurers provide coverage for autism spectrum disorder to South Carolina residents when they issue policies to the residents' employers located outside of South Carolina.

Law/Analysis

In 2007, the Legislature added section 38-71-280 of the South Carolina Code (Supp. 2008). This provision requires health insurance plans to provide coverage for the treatment of autism spectrum disorder. S.C. Code Ann. § 38-71-280(B). As Ms. McGriff points out, section 38-71-280 is contained in article 1 of chapter 71 of title 38, entitled "General Provisions." Ms. McGiff asserts that the provisions in article 1 only apply to individual and group insurance issued in the state of South Carolina. To support this position, she argues that section 38-71-750 of the South Carolina Code (2002 & Supp. 2008), contained in article 5 of chapter 71 of title 38, "specifically addresses

the requirements for group policies issued outside this State . . . ." She emphasizes that this provision states: "No group accident, group health, or group accident and health insurance coverage may be extended to residents of this State under a policy issued outside this State which does not provide in substance the provisions of this article unless the director or his designee determines that certain provisions are not appropriate for the coverage provided." S.C. Code Ann. § 38-71-750(1) (2002) (emphasis added). Senator Thomas takes an opposite view of the statutory construction of the articles contained in chapter 71. He argues that the provisions in article 1 are applicable to all policies issued outside the state covering South Carolina residents.

The question posed to us is a question of statutory interpretation. As such, we must follow the rules of statutory interpretation, the primary of which is to ascertain and effectuate the intent of the Legislature. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008). "The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in the language used construed in light of the intended purpose. Sections which are part of the same general statutory law of the state should be construed together and each given effect if it can be done by any reasonable construction." Glover by Cauthen v. Suitt Const. Co., 318 S.C. 465, 469, 458 S.E.2d 535, 537 (1995). "It is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature." Lindsay v. S. Farm Bureau Cas. Ins. Co., 258 S.C. 272, 277,188 S.E.2d 374, 376 (1972). However, "they may not be construed to limit the plain meaning of the text." Garner v. Houck, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993).

Chapter 71 of title 38, according to its title, pertains to accident and health insurance. Article 1under this chapter is entitled "General Provisions." The statutes contained in this article include the types of coverages that may be written by insurers under this provision, provisions governing insurance applications, and provisions requiring the coverage of certain persons, illnesses, and procedures. Article 3 under chapter 71 is entitled "Individual Accident and Health Policies" and article 5 is entitled "Group Accident and Health Insurance." These titles indicate the Legislature's intent to separately address group and individual policies. Based on our reading of the titles along with the provisions contained in each article, we would assume that while articles 3 and 5 separately address issues pertaining to individual and group accident and health policies, the provisions in article 1 apply generally to all accident and health policies.

In our review of the provisions contained in article 1 of chapter 71, we found no provision specifically stating that accident and health insurance policies issued outside South Carolina, but extended to residents of this State, must comply with its provisions. Thus, we understand Ms. McGriff's argument that because article 1 lacks such a provision that the Legislature intended for the statutes in article 1 not to apply to accident and health insurance polices issued out-of-state, but extended to South Carolina residents. However, we also did not find any provision specifically exempting these types of policies from the provisions in article 1. Moreover, we believe that the

Legislature, while not making the provisions of article 1 mandatory for these policies, did not intend to prevent these provisions from applying to these policies. As explained above, we believe the Legislature intended for the statutes contained in article 1 to apply generally to all accident and health insurance policies and the provisions in article 5 to apply specifically to group accident and health insurance policies.

Nonetheless, we also believe that the Legislature can limit the applicability of a particular provision contained in article 1 by the language used in the individual provision. For example, Section 38-71-46 of the South Carolina Code (2002), requiring coverage of diabetes mellitus, applies only to certain health insurance policies "issued and renewed" in South Carolina. Thus, we look to the language contained in section 38-71-280 to determine whether it applies to accident and health insurance policies issued outside of South Carolina, but extended to South Carolina residents.

Section 38-71-280(B) provides: "A health insurance plan as defined in this section must provide coverage for the treatment of autism spectrum disorder." This provision defines the term "health insurance plan" to mean

> a group health insurance policy or group health benefit plan offered by an insurer. It includes the State Health Plan, but does not otherwise include any health insurance plan offered in the individual market as defined in Section 38-71-670(11), any health insurance plan that is individually underwritten, or any health insurance plan provided to a small employer, as defined by Section 38-71-1330(17) of the 1976 Code.

Id. § 38-71-280(A)(4). Moreover, section 38-71-280(A)(2) defines insurer to mean "an insurance company, a health maintenance organization, and any other entity providing health insurance coverage, as defined in Section 38-71-670(6), which is licensed to engage in the business of insurance in this State and which is subject to state insurance regulation." (emphasis added).

Based on section 38-71-280's definition of insurer, whether or not a foreign insurer issuing a policy in another state, but extended the benefits of such a policy to a South Carolina resident is required to provide coverage for the treatment of autism spectrum disorder, depends on whether the insurer is licensed to engage in the business of insurance in South Carolina and is subject to our State's insurance regulations. Before considering whether insurers that issue such policies are licensed to engage in the business of insurance in South Carolina, we first address whether such insurers are subject to State regulation.

As Ms. McGriff mentioned in her letter, section 38-71-750 clearly makes the provisions in article 5 of chapter 71 applicable to insurers issuing policies to out-of-state employers who have covered employees residing in South Carolina. The provisions in article 5 state specific requirements for group accident and health insurance policies, including form requirements, mandatory policy provisions, and guidelines for the payment of benefits. Thus, we are of the opinion, that these insurers are subject to regulation by the state of South Carolina.

Whether these insurers issuing policies to out-of-state employers who happen to have employees residing in South Carolina are licensed to engage in the business insurance is a more difficult question. Section 38-5-10 of the South Carolina Code (2002) requires insurers doing business in South Carolina to be licensed and supervised unless specifically exempt under that statute. Section 38-5-10(a) states:

> (a) Without excluding other activities which may not constitute doing business in this State, a foreign or alien insurer is not considered to be doing business in this State, for purposes of this chapter, or Chapter 7, 13, 25, or 27, solely by reason of carrying on in this State any one or more of the following activities:
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> (1) Maintaining bank accounts.
>
> (2) Creating or acquiring evidences of debt, mortgages, or liens on real or personal property, and enforcing rights in connection therewith in any action or proceeding, whether judicial, administrative, or otherwise.
>
> (3) Owning and controlling a subsidiary corporation incorporated in or transacting business within this State.

This provision does not specifically exempt from licensure foreign insurers who issue policies to out-of-state employers who have employees residing in South Carolina. However, this provision does clarify that in order for an insurer to be required to obtain a license in South Carolina, the insurer must be "doing business in this State."

Chapter 5 of title 38 does not define what constitutes "doing business" in South Carolina. Additionally, we did not locate any case law in South Carolina interpreting what constitutes "doing business" for purposes of section 38-5-10. However, chapter 27 of title 38, the Insurers' Rehabilitation and Liquidation Act, defines doing business as including the following acts:

> (a) the issuance or delivery of contracts of insurance to persons resident in this State;
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> (b) the solicitation of applications for such contracts or other negotiations preliminary to the execution of such contracts;
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> (c) the collection of premiums, membership fees, assessments, or other consideration for such contracts;
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> (d) the transaction of matters subsequent to execution of such contracts and arising out of them; or
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> (e) operating under a license or certificate of authority, as an insurer, issued by the director or his designee.

S.C. Code Ann. § 38-27-20(4) (2002).

Moreover, other jurisdictions, when deciding whether a state has the power to license and regulate a business, consider "the location of related activities prior and subsequent to the making of the insurance contract, of the degree of interest of the regulating state in the object insured, and the location of the property insured . . . ." 44 C.J.S. Insurance § 125. See also, 43 Am Jur. 2d. Insurance § 52. In addition, other states generally consider such factors as whether the insurer maintains agents within the state; collects premiums in the state; actively solicits business within the state; and investigates, adjusts, and settles claims within the state. Id.

When a foreign insurer who issues policies to out-of-state employers with employees residing in a state contracts with the out-of-state employer and not the employee, courts generally consider those contracts as entered into and delivered in the state where the employer resides. See Simms v. Metropolitan Life Ins. Co., 685 P.2d 321(Kan. Ct. App. 1984)(finding that with regard to group policies, the policy holder is the employer, not the employee). Moreover, some states considering group insurance determined that an employer is not the agent of the insurance company and therefore, the insurer was not doing business in the state. Connecticut General Life Ins. Co. v. Speer, 48 S.W.2d 553 (Ark. 1932). Based on these principles, courts in other jurisdictions determined that having employees who reside in a particular state and who are covered under a group insurance policy issued to the employer in another state by a foreign insurance company is not sufficient to conclude that the insurer is doing business in the employees' state of residence. Simms, 685 P.2d at 321; Connecticut General Life Ins. Co., 48 S.W.2d at 553.

However, as Senator Thomas points out in his letter, section 38-61-10 of the South Carolina Code (2002) provides "All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State." Moreover, Senator Thomas points to the District Court's decision in Heslin-Kim v. CIGNA Group Ins., 377 F.Supp.2d 527 (D.S.C. 2005). In that case, the District Court determined that South Carolina law applies to a supplemental life insurance policy pursuant to this provision simply because the insured lived in South Carolina while paying the premiums although the policy was originally issued in Georgia. Heslin-Kim, 377 F.Supp.2d at 527. Under the situation described in both Ms. McGriff's and Senator Thomas's request letters, we would assume, as courts in other jurisdictions have found, that the employer is paying the premium. Thus, the circumstances presented to us are different than those described in Helsin-Kim. Nonetheless, section 38-63-10 indicates that an insurance policy insuring a South Carolina resident is considered to be made in South Carolina. Thus, a court could determine group insurance policies covering South Carolina residents are deemed made in South Carolina although the contract between the insurer and the employer were made outside of South Carolina. As such, a court could consider this fact in determining whether the insurer is doing business in South Carolina.

We believe, as courts in other jurisdictions found that what constitutes "doing business" is a question of fact. Alliance Steel, Inc. v. Piland, 134 P.3d 669, 673 (Kan. Ct. App. 2006); Schwartz v. Breakers Hotel Corp., 178 N.Y.S.2d 393, 394 (N.Y. Sup. Ct. 1958); Harrison v. Corley, 37 S.E.2d 489, 491 (N.C. 1946). Thus, the ultimate determination as to whether a particular insurer is doing business in South Carolina is a question of fact. This Office recognizes that "only a court may make determinations of facts." Op. S.C. Atty. Gen., August 5, 2008. Therefore, a court must ultimately decide whether a foreign insurer is doing business in South Carolina. Accordingly, only a court could decide with finality if a particular insurer must be licensed in this State.

In our discussions with the Department, we understand that the Department takes the position that insurers issuing policies to out-of-state employers covering South Carolina residents are exempt from licensure pursuant to section 38-25-150 of the South Carolina Code (2002) and therefore, do not fall under the definition of insurer in section 38-71-280. Section 38-25-150 is found in article 3 of chapter 25 of title 38 of the South Carolina Code, which contains provisions governing unauthorized transactions of insurance business. Section 38-25-110, making it unlawful for insurers to transact insurance business in this State without a certificate of authority from the Department, lists eight acts specifically considered to be transactions of insurance business. Section 38-25-110 specifies the following as transactions of insurance business in South Carolina:

> (1) The making of or proposing to make, as an insurer, an insurance contract.

> (2) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety.
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> (3) The taking or receiving of any application for insurance.
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> (4) The receiving or collection of any premium, commission, membership fees, assessments, dues, or other consideration for any insurance or any part thereof.
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> (5) The issuance or delivery of contracts of insurance to residents of this State or to persons authorized to do business in this State.
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> (6) Directly or indirectly acting as an agent for or otherwise representing or aiding on behalf of another, any person or insurer in the solicitation, negotiation, procurement, or effectuation of insurance or renewals thereof or in the dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, a fixing of rates or investigation or adjustment of claims or losses or in the transaction of matters after effectuation of the contract and arising out of it, or in any other manner representing or assisting a person or insurer in the transaction of insurance with respect to subjects of insurance resident, located, or to be performed in this State. This section does not prohibit full-time salaried employees of a corporate insured from acting in the capacity of an insurance manager or buyer in placing insurance in behalf of their employer.
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> (7) The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of the statutes relating to insurance.
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> (8) The transacting or proposing to transact any insurance business in substance equivalent to any of the foregoing in a manner designed to evade the insurance laws of this State.

Section 38-25-150 of the South Carolina Code exempts certain transactions performed by insurers from the provisions in article 3. This provision states:

This article does not apply to:

(1) The lawful transaction of surplus lines insurance.

(2) The lawful transaction of reinsurance by insurers.

(3) Transactions in this State involving a policy lawfully solicited, written, and delivered outside this State covering only subjects of insurance not resident, located, or expressly to be performed in this State at the time of issuance, and which transactions are subsequent to the issuance of the policy.

(4) Attorneys acting in the ordinary relation of attorney and client in the adjustment of claims or losses.

(5) Except for mass-marketed insurance, transactions in this State involving group life and group accident and health or blanket accident and health insurance or group annuities where (i) the master policy was lawfully issued and delivered in and pursuant to the laws of a state in which the insurer was authorized to do an insurance business and in which the policyholder was domiciled or otherwise had a bona fide situs and (ii) except for group annuities, the insurer complies with §§ 38-65-50, 38-65-60, 38-71-740, and 38-71-750.

(6) Transactions in this State involving any policy of insurance or annuity contract issued before April 30, 1975.

(7) Contracts of insurance covering risks of transportation and navigation and transactions in this State relative to a policy issued or to be issued outside this State involving insurance on vessels, craft or hulls, cargoes, marine builder's risk, marine protection and indemnity, or other risk, including strikes and war risks commonly insured under ocean or wet marine forms of policy.

(8) Transactions in this State involving contracts of insurance other than contracts of life, accident, or accident and health

> insurance issued to one or more industrial insureds. An "industrial insured" means an insured:
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> > (i) Which procures insurance by use of the services of a full-time employee acting as a risk manager or insurance manager or utilizing the services of a regularly and continuously qualified insurance consultant;
> >
> > (ii) Whose aggregate annual premiums for insurance on all risks total at least twenty-five thousand dollars; and
> >
> > (iii) Which has at least twenty-five full-time employees.

(emphasis added).

The Department, relying on subsection 5 of section 38-25-150, asserts that foreign insurers issuing policies to out-of-state employers that cover South Carolina residents are exempt from licensure because these policies are issued and delivered to the out-of-state employer, who acts as the policyholder, presumably pursuant to the laws of the state in which the employer is domiciled. We agree that section 38-25-150(5) allows insurers issuing policies to out-of-state employers to transact insurance business in South Carolina without a certificate. Moreover, it is our understanding a certificate of authority is equivalent to a license. Thus, a court could find that these insurers are not required to be licensed in South Carolina and therefore, do not fall under the definition of insurer pursuant to section 38-71-280.

However, we must point out that this provision does not specifically exempt such insurers from licensure. Rather, we understand this provision allows insurers to carry out transactions of insurance business, as defined in section 38-25-110, without first obtaining a certificate of authority from the Department. Thus, the exemption provided under section 38-25-150 may not be broad enough to effectively exempt a foreign insurer from the licensure requirement in section 38-5-10. In addition, section 38-25-150 states that it exempts insurers from the provisions in article 3, but does not indicate that it exempts insurers from other provisions of the Insurance Law, namely the licensure requirement contained in chapter 5 of title 38. Accordingly, we are compelled to point out that a court could find that section 38-25-150 does not act to exempt foreign insurers issuing policies to out-of-state employers who have employees residing in South Carolina from the licensure requirement. Because these types of insurers are clearly subject to regulation by the Department, if

a court were to also find that these insurers are licensed to engage in the business of insurance in South Carolina, these insurers would fall within the definition of an insurer pursuant to section 38-71-280 and thus, be required to provide coverage for the treatment of autism spectrum disorder.

Conclusion

Based on our interpretation of the provisions contained in chapter 71 of title 38, we believe a court would most probably find that the provisions in article 1 apply to all accident and health insurance policies. Although the Legislature clearly provides that the provisions in article 5 apply to group policies issued outside of South Carolina and extended to South Carolina residents, we do not believe it intended to exclude the provisions in article 1 from these types of policies. However, we are of the opinion that the Legislature can and has limited the application of specific provisions in article 1 to certain types of policies. Thus, it is our opinion that a court likely would look to the particular provision in article 1 to determine whether it applies to policies issued outside of South Carolina.

With regard to section 38-71-280, whether or not a policy issued by a foreign insurer to an employer who has employees residing in South Carolina must provide autism coverage hinges upon whether these insurers fall under section 38-71-280's definition of insurer. To be considered an insurer for purposes of section 38-71-280, the insurer must be "licensed to engage in the business of insurance in [South Carolina] and . . . subject to state insurance regulation." As evidenced by the Legislature's specific application of the provisions in article 5 of chapter 71 of title 38 to insurers under these circumstances, we believe that they are clearly regulated by the state of South Carolina. Thus, if such insurers are licensed in South Carolina, section 38-71-280 mandates coverage of autism spectrum disorder.

A question exists as to whether these types of insurers must be licensed in South Carolina. First, South Carolina Insurance Law requires insurance companies doing business in South Carolina to obtain a license. Our courts have yet to address whether a foreign insurer who issues a policy out-of-state that covers South Carolina residents is doing business in South Carolina. Other jurisdictions determined that when a policy simply covers an employee who is a resident of the state in question when the policy was issued to an out-of-state employer and no other evidence exists to show that the insurer is doing business in the state, the insurer is not doing business in the employee's state of residence. However, section 38-61-10 indicates the Legislature's intention to treat all contracts of insurance covering residents of South Carolina as made in South Carolina. Thus, a court could use this statute to support a finding that these types of insurers under these circumstances are doing business in South Carolina. Nonetheless, we recognize the question of whether a particular insurer is doing business in South Carolina as a question of fact. Thus, we believe a court would ultimately have to make a final determination on this question.

Moreover, it is our understanding that the Department takes the position that insurers who issue policies out-of-state covering South Carolina residents are exempt from the licensure requirement pursuant to section 38-25-150(5) of the South Carolina Code, exempting insurers who issue the master policy of a group accident and health policies to a policyholder in another state from the prohibition of transacting insurance business in South Carolina without a certificate. We agree that this provision exempts such transactions and believe a court could find pursuant to this provision that a foreign insurer would not have to obtain a license to issue a policy to an out-of-state employer. Nonetheless, we caution that a court could narrowly construe section 38-25-150 and find that it is not a blanket exemption from licensure. As such, a court could determine that a foreign insurer issuing policies to out-of-state employers could satisfy the definition of insurer in section 38-71-280(A)(2) requiring that insurer to provide coverage for autism spectrum disorder. Due to the uncertainty surrounding section 38-71-280 and whether insurers issuing policies to out-of-state employers that cover South Carolina residents must be licensed in South Carolina, we advise that a declaratory judgement action be brought to interpret this provision. In addition, the General Assembly may wish to consider this issue and offer some form of legislative clarification.

Very truly yours,

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