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**THE ARKANSAS COUNTERPART TO THE INSURANCE FRAUD PROTECTION PROVISIONS OF THE
FEDERAL VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994**

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Overview

In February of 1997, the Arkansas General Assembly passed Act 217 ("Act 217").¹ The provisions of Act 217 serve as the Arkansas counterpart to the insurance fraud protection provisions of the 1994 federal omnibus anti-crime bill entitled the Violent Crime Control and Law Enforcement Act of 1994 ("VCCLEA").² Act 217, like the VCCLEA, contains a variety of prohibitions against the commission of delineated "fraudulent insurance acts."³ Of importance to insurers doing business in Arkansas, Act 217 prohibits the employment of a person convicted of a felony involving dishonesty or breach of trust. Unlike VCCLEA, Act 217 does not grant the Commissioner any discretion to permit such a person to be employed by an insurer in Arkansas.

In addition to Act 217's prohibitions, it imposes a duty upon insurers⁴ to implement certain "antifraud initiatives" and to report any fraudulent insurance acts that the insurer knows or believes are being, will be, or have been committed.⁵ Act 217 also establishes the Insurance Fraud Investigation Division within the Arkansas Insurance Department.

Prohibited Acts

Act 217 prohibits a variety of "fraudulent insurance acts." A person commits a "fraudulent insurance act" when he or she, with the intent to defraud: (a) presents falsified information to an insurer, the Commissioner or a chief regulatory official in another state; (b) solicits or accepts the insurance of risks on the behalf of an insurer, knowing the one responsible for the risk is insolvent; (c) in anyway alters the asset records of an insurer; willfully embezzles any monies, funds, premiums, credits or other property of an insurer; (d) transacts in the business of insurance in Arkansas without a license, certificate of authority or other legal authority; or (e) attempts to commit or aid in the commission of any of the above fraudulent acts.⁷

Act 217 also prohibits any person who has been convicted of a felony involving dishonesty or breach of trust from participating or engaging in the business of insurance,⁸ and prohibits an insurer from allowing such a prohibited person to participate in the business of insurance.⁹ These provisions of Act 217 are similar to those found within the VCCLEA.

Any violation of Act 217 is a criminal offense. The violator, if convicted, is guilty of a felony and subject to civil penalties not to exceed \$10,000 per violation. Furthermore, the Commissioner may suspend or revoke a violator's license to engage in the business of insurance in Arkansas and order restitution as appropriate.

Investigatory Authority and the Insurance Fraud Investigation Division

In addition to prohibiting the above acts, Act 217 gives the Commissioner authority to investigate suspected fraudulent acts and any person conducting insurance business in Arkansas. To this end, Act 217 establishes the Insurance Fraud

and any person conducting insurance business in Arkansas. To this end, Act 217 establishes the Insurance Fraud Investigation Division ("the Division") of the Arkansas Insurance Department.¹¹ The Division is given the primary duty to investigate suspected violations of Act 217, review any reports or complaints of such acts reported to the Division by law enforcement personnel, insurers, and members of the general public, and regulate compliance with Act 217's imposed duties on insurers.¹² To carry out this function, Act 217 provides the Division with subpoena authority to compel the production of documents and authority to seek court enforcement of those subpoenas.¹³ Act 217 also gives the Division the implicit authority to enter into cooperative agreements with other state and federal agencies to assist in the investigation of fraudulent acts occurring outside the state of Arkansas.¹⁴ The Division may share evidence and records with state and federal agencies and designate representatives, including officials of other states, to make inspections on behalf of the Division.¹⁵ The Division may also serve as the representative in that same regard for officials of other states.¹⁶

Statutory Duties Imposed on Insurers

Act 217 imposes special duties upon insurers. Insurers have a duty to report any fraudulent acts they know or believe are being, will be, or have been committed, to the Division.¹⁷ Any failure on the part of an insurer to make a required report is itself a misdemeanor punishable by a fine not to exceed \$1,000 or by imprisonment for not more than one year, or both.¹⁸

To facilitate the reporting of fraudulent acts, Act 217 provides that any person, not only an insurer, who furnishes information concerning suspected fraudulent acts will be immune from civil action.¹⁹ The immunity provisions of Act 217 apply only if the information is provided to the Arkansas Insurance Department; federal, state or local law enforcement or regulatory officials; an insurer's employee whose activities include investigating or reporting suspected fraud; or the National Association of Insurance Commissioners ("NAIC").²⁰

Furthermore, any information received in a report or complaint or obtained during an investigation is not a public record subject to the Arkansas Freedom of Information Act disclosure requirements and is not subject to discovery or subpoena in a criminal or civil action until the investigation is closed by the Division and consent to disclosure has been given by the Commissioner.²¹ Information may, however, at the discretion of the Commissioner, be released as follows: in an administrative or judicial proceeding relating to the enforcement of insurance laws; to law enforcement agencies, regulatory officials, the NAIC or any other organization whose purpose is the detection or prevention of insurance fraud; or to an insurer who has been injured by a fraudulent insurance act.²²

Act 217 also requires that insurers implement "antifraud initiatives."²³ The antifraud initiatives requirement can be satisfied be either the hiring of fraud investigators or the establishment of an "antifraud plan."²⁴ If the insurer chooses to hire a fraud investigator to satisfy the requirement, the investigator must either be an employee who is qualified by education, training, or experience or an independent contractor who is a licensed investigator.²⁵ If an insurer uses an employee as the investigator, the employee must complete three hours of continuing education a year in the detection, investigation, and reporting of insurance fraud.²⁶

If the insurer chooses to implement an antifraud plan, the plan must be submitted to the Division for approval and outline specific procedures to:

1. Prevent, detect, and investigate suspected fraudulent insurance acts;
2. Educate and train appropriate employees in the insurer's antifraud plan, as well as in the identification of suspected fraudulent insurance acts;
3. Comply with the mandatory reporting requirements regarding suspected fraudulent insurance acts;
4. Increase awareness of the impact of fraudulent insurance acts and the methods of preventing insurance fraud;

5. Pursue civil remedies for financial loss caused by fraudulent insurance acts, where appropriate; and
6. Facilitate assistance and communication with the Insurance Fraud Investigation Division ... by identifying a representative within the employ of the insurer to act as a liaison on insurance fraud matters.²⁷

The Commissioner is authorized to exempt an insurer from the "antifraud initiatives" requirement if it can be shown "that such an exemption would not be detrimental to the interests of the public."²⁸

Lack of a Consent Provision for Prohibited Felons

The Problem. Although it seems obvious that Act 217 was predicated on the insurance fraud protection provisions of the VCCLEA (both contain similar prohibitions and penalties), there is one huge distinction: Whereas both the VCCLEA and Act 217 contain similar provisions prohibiting individuals convicted of certain felonies from engaging in or participating in the business of insurance, only the VCCLEA contains a provision removing the prohibition for those individuals who have obtained written consent to engage in the business of insurance from any insurance regulatory official authorized to regulate that individual.²⁹ A similar written consent provision is noticeably absent from Act 217. Furthermore, there is no express provision in the VCCLEA that would preempt the Arkansas blanket prohibition.

The effect of the blanket prohibition found in Act 217 could have far reaching consequences for insurers and their employees inside and outside of Arkansas. For those insurers domiciled in Arkansas, their employees convicted of felonies must cease engaging in the business of insurance with no possibility of discretionary consent by the Commissioner. For those insurers not domiciled in Arkansas, their employees must cease engaging in the business of insurance within Arkansas, regardless of whether the employee or the insurer has obtained consent from the appropriate regulator in the insurer's domiciliary state.

A Possible Solution. Although the Arkansas blanket prohibition does not provide for consent, there is an alternative: remove the disabling felony conviction by seeking an expungement. The difficulty of this possible solution depends upon the nature and jurisdiction of the felony.

In Arkansas, once an individual has had his or her record expunged and sealed, all his or her privileges and rights will be restored and the expunged record will have no effect on any of the individual's civil rights or liberties.³⁰ Expungement would effectively eliminate the employee's prohibited status. Therefore, insurers with Arkansas employees should require the employee to seek expungement of his or her felony conviction before returning the employee to work. This method is available in Arkansas only for certain felony convictions, namely nonviolent or underage felony convictions following which the individual convicted has successfully completed probation or community punishment and has no prior violent felony convictions.³¹ Where the felony conviction involves another state, similar proceedings should be followed under that state's applicable statutory provisions regarding expungement of felony records.

The insurer and its employee are faced with a more difficult situation where the employee's felony conviction is for a federal crime. Currently, there is no federal expungement statute providing for restoration of civil liberties similar to that found in Arkansas. Therefore, the insurer's options are even more limited. Certainly, the employee could seek an expungement of his or her federal record, but a successful outcome from that course of action is doubtful. Although the federal courts have the inherent power to expunge their own records of criminal proceedings, such discretionary power is rarely exercised.³²

Those insurers that are not domiciled in Arkansas and which do not conduct a substantial amount of business in Arkansas should nevertheless be wary. Under the current NAIC proposed guidelines for the VCCLEA, only one written consent from a Commissioner to engage in the business of insurance is necessary for those convicted of a felony. The proposed guidelines describe a methodology by which only one and the most appropriate regulator is given the function of providing this consent under the VCCLEA. The guidelines recommend that a Commissioner should only consider applications for written consent from a prohibited person if that individual:

1. Will engage in and maintain an employer-employee, owner or director type relationship with an insurance company domiciled within the state, wherein the applicant will not need subsequent licensure as a resident by the Commissioner ... ; or
2. Is a legal resident of the Commissioner's state and will also simultaneous [sic] need a "resident license" to perform the insurance activities; or
3. Fails to meet the criteria for either 1) or 2) above, but whose insurance activities will be substantially performed as an "agent-servant" or "independent contractor" for either an insurance company domiciled within this state or an entity or person who possesses a "resident license" granted by the Commissioner of this state.³³

The NAIC's proposed guidelines could lull an insurer into a false sense of security, such as where that insurer has employees engaging in the business of insurance within the state of Arkansas who have previously obtained consent from another jurisdiction. Although consent from only one state's regulatory authority is sufficient for purposes of the VCCLEA, under which a prohibited individual need only obtain consent from "any insurance regulatory official authorized to regulate" that individual, such consent remains ineffective in Arkansas.

It is anticipated that an amendment to Act 217 will be submitted during the 1999 legislative session of the Arkansas General Assembly, whereby, similar to the VCCLEA, the Commissioner will be given discretion to permit employment of a convicted felon under certain conditions.

Summary

The Arkansas counterpart to the federal law is in many ways the mirror image of the federal act, providing a laundry list of prohibited activities and their matching criminal and civil penalties, including a similar provision prohibiting persons convicted of a felony involving dishonesty or breach of trust from engaging in the business of insurance. For those insurers who are aware of the VCCLEA's various provisions and prohibitions, Act 217's prohibitions should hold few surprises.³⁴

Act 217, however, contains additional duties imposed upon insurers: the duty to report fraud and the duty to implement antifraud initiatives. Insurers should, therefore, familiarize themselves with these imposed duties and the rules promulgated by the Arkansas Insurance Department, which are neither lengthy nor complicated. Moreover, Act 217 contains one potential pitfall to those insurers unaware of the Arkansas legislation. Act 217 does not contain a provision similar to that found in the VCCLEA providing for written consent from the Commissioner to engage in the business of insurance for those convicted of a felony. Insurers conducting business in Arkansas should take additional steps to insure that prohibited employees cease working in Arkansas and that prohibited persons are not hired until the appropriate steps have been taken to remove that person's disability; consent from another jurisdiction's regulatory authority is insufficient.

As of the date this article was written, the authors could find no other state legislation similar to Act 217.

Endnotes

1. Act. of Feb. 19, 1997, No. 217, 1997 (codified as Ark. Code Ann. 23-66-501 to 512 (Supp. 1997)).
2. 18 U.S.C. 1033-34.
3. Ark. Code Ann. 23-66-501(d) & 23-66-502 (Supp. 1997).
4. "Insurer" for purposes of this article includes insurer, reinsurer or any other person engaged in the business of insurance.

5. Ark. Code Ann. 23-66-505 & 23-66-510 (Supp. 1997).

6. *Id.* 23-66-508.

7. *Id.* 23-66-501(d)(1)-(6).

8. *Id.* 23-66-502(c)(1).

9. *Id.* 23-66-502(c)(2).

10. *Id.* 23-66-512(l)-(2). Any person convicted of a felony violation of Act 217 is disqualified from engaging in the business of insurance in Arkansas.

11. *Id.* 23-66-508.

12. *Id.* 23-66-508(b).

13. *Id.* 23-66-508(c)(1).

14. *See Id.* 23-66-508(c)(5).

15. *Id.*

16. *Id.*

17. *Id.* 23-66505(a); Arkansas Department of Insurance Rule 67 (1997). The Arkansas Department of Insurance has established a "Fraud Referral Form" to be used by insurers to report suspected or known acts of fraud to the Division. *See* Rule 67.

18. Ark. Code Ann. 23-66-505(b) (Supp. 1997).

19. *Id.* 23-66-506(a). The immunity does not extend to statements made to investigators with actual malice. *Id.* 23-66-506(b).

20. *Id.* 23-66-506(a)(l)-(4).

21. *Id.* 23-66-507(a).

22. *Id.* 23-66-507(b).

23. *Id.* 23-66-510(a).

24. *Id.*; Arkansas Department of Insurance Rule 66, 6 (1997).

25. Rule 66, 7.

26. *Id.*

27. *Id.*, 8.

28. Ark. Code Ann. 23-66-510(b) (Supp. 1997).

29. 18 U.S.C. 1033(e)(2).

30. Ark. Code Ann. 16-90-902 (Supp. 1997).

31. *See Id.* 16-90-602 & 16-93-01207 (Supp. 1997).

32. *United States v. Friesen*, 853 F.2d 816 (10th Cir. 1988). By way of example to show the difficulty in obtaining an expunction of a federal criminal record, the Tenth Circuit stated that the mere chance that an attorney's professional reputation could be adversely affected by records of an arrest for the knowing and intentional manufacture of cocaine was insufficient justification to warrant a district court's expunction of the attorney's arrest record following an acquittal of the charges. *Id.*

33. *See* "Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994": 18 *United States Code Sections 1033 and 1034*. (NAIC Tentative Draft Oct 28, 1997).

34. *See generally* S. David Childers & Christy A. Chism, "The Extraordinary Scope and Potential Regulatory Pitfalls of the Insurance Fraud Protection Act", FORC Quarterly Journal of Insurance Law and Regulation, Dec. 7, 1997, at 1 for a discussion of the VCCLEA.