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CHAPTER 25.

 UNAUTHORIZED TRANSACTION OF INSURANCE BUSINESS

ARTICLE 1.

 DECLARATIONS

**SECTION 38‑25‑10.** Declaration.

(a) The General Assembly declares that it is concerned with the protection of residents of this State against acts by insurers not authorized to conduct an insurance business in this State, by the maintenance of fair and honest insurance markets, by protecting authorized insurers which are subject to regulation from unfair competition by unauthorized insurers, and by protecting against the evasion of the insurance regulatory laws of this State. In furtherance of this state interest, the General Assembly herein provides methods for substituted service of process upon such insurers in any proceeding, suit, or action in any court, including the Administrative Law Judge Division as provided by law, and substituted service of any notice, order, pleading, or process upon such insurers in any proceeding by the director or his designee to enforce or effect full compliance with the insurance laws of this State. In so doing, the state exercises its powers to protect residents of this State and to define what constitutes transacting an insurance business in this State and also exercises powers and privileges available to this State by virtue of Public Law 79‑15, 79th Congress of the United States, Chapter 20, 1st Session, S. 340, 59 Stat. 33; 15 U.S.C., Sections 1011 to 1015, inclusive, as amended, which declares that the business of insurance and every person engaged therein are subject to the laws of the several states.

(b) The remedies and proceedings provided in this chapter are in addition to, and not in substitution for, any other remedies or proceedings provided by law.

ARTICLE 3.

 UNAUTHORIZED INSURANCE TRANSACTIONS

**SECTION 38‑25‑110.** Prohibition on transaction of insurance business in State without certificate of authority.

It is unlawful for an insurer to transact insurance business in this State without a certificate of authority from the director or his designee. Any of the acts listed in items (1) through (8) in this State effected by mail or otherwise by or on behalf of an unauthorized insurer is considered to constitute the transaction of an insurance business in this State. The venue of an act committed by mail is at the point where the matter transmitted by mail is delivered and takes effect. Unless otherwise indicated, the term “insurer” as used in this section includes all corporations, associations, partnerships, and individuals engaged as principals in the business of insurance and also includes interinsurance exchanges and mutual benefit societies.

(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.

(3) The taking or receiving of any application for insurance.

(4) The receiving or collection of any premium, commission, membership fees, assessments, dues, or other consideration for any insurance or any part thereof.

(5) The issuance or delivery of contracts of insurance to residents of this State or to persons authorized to do business in this State.

(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.

(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.

(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 38‑25‑120.** Acting as agent for unauthorized insurer prohibited.

No person may in this State act as agent for an insurer not authorized to transact business in this State or negotiate for or place or aid in placing insurance coverage in this State for another with an unauthorized insurer.

**SECTION 38‑25‑130.** Aiding unauthorized insurer prohibited.

No person may in this State aid an unauthorized insurer in effecting insurance or in transacting insurance business in this State, either by fixing a rate, or by adjusting or investigating losses, by inspecting or examining risks, by acting as attorney in fact or as attorney for service of process or otherwise, except as provided in Sections 38‑25‑510 and 38‑25‑520.

**SECTION 38‑25‑140.** Insurance on out‑of‑state property by insurer not locally authorized.

No person may make, negotiate for or place, or aid in negotiating or placing an insurance contract in this State for another who is an applicant for insurance covering any property or risk in another state, territory, or district of the United States with an insurer not authorized to transact insurance business in the state, territory, or district where the property or risk or any part thereof is located.

**SECTION 38‑25‑150.** Exemptions from article.

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 Sections 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:

(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.

**SECTION 38‑25‑160.** Director may exempt insurer or other organization from provisions of chapter; certain requirements; discontinuance of exemption.

The director or his designee may, by regulation of the department or by his order, exempt from all or any provisions of this chapter an insurer or other organization not formed or operating for profit which affords life insurance or annuities to nonprofit educational and scientific institutions and their staff members in this State. However, in affording this exemption the director or his designee shall require the insurer or other organization to appoint the director as agent for service of process. The director or his designee may require the insurer or other organization to file with the department, as information, policy forms, annual statements, and financial and other similar material. The director or his designee may, after due notice and hearing, discontinue the exemption for any reason which would have, if then existing or known, justified his refusal to afford the exemption when it was granted.

ARTICLE 5.

 REMEDIES AND PENALTIES

**SECTION 38‑25‑310.** Director authorized to seek restraining order.

Whenever the director or his designee believes, from evidence satisfactory to him, that an insurer is violating or about to violate Section 38‑25‑110 the director or his designee may, through the Attorney General, cause a complaint to be filed in the Court of Common Pleas of Richland County to enjoin and restrain the insurer from continuing the violation, engaging in the violation, or doing any act in furtherance of the violation. The court has jurisdiction of the proceeding and has the power to make and enter an order or judgment awarding preliminary or final injunctive relief as in its judgment is proper.

**SECTION 38‑25‑315.** Emergency cease and desist orders; penalties.

(A) As an alternative to the procedural remedy detailed within Section 38‑25‑310, whenever the director, from evidence which is satisfactory to him, has reasonable grounds to believe that a person has engaged in, or is about to engage in, the transaction of insurance business in violation of this chapter and that transaction will adversely impact upon public health, public safety, or public welfare, he may reduce his findings of fact and his conclusions of law to writing and he may issue an emergency cease and desist order. That order must be served upon the person either by certified mail, return receipt requested, at that person’s last known address, or in any other manner permitted by law.

(B) An emergency cease and desist order issued by the director must, within its provisions, give notice that the person may contest that order by petitioning for an immediate public hearing before an administrative law judge. The filing of the petition does not itself stay enforcement of the director’s decision. The administrative law judge may order a stay upon appropriate terms, and if a stay is granted, the administrative law judge must specifically consider in his order the appropriateness of the posting of a bond by the petitioner. At the public hearing the person must be given the opportunity to be heard upon the findings and conclusions within the emergency cease and desist order. If no request for a public hearing is received within ten days from the person’s receipt of service of the emergency cease and desist order, then upon application by the director and without a public hearing, the administrative law judge must make that emergency order a permanent cease and desist order.

(C) If an administrative law judge determines that the person charged with transacting insurance business in violation of this chapter knew or should have known that his actions were in violation of this chapter, then in addition to declaring the cease and desist order to be permanent the administrative law judge may impose a penalty of up to fifty thousand dollars for each violation. The penalty may be imposed following a public hearing requested by the person pursuant to subsection (B) or following a public hearing requested by the director following an administrative law judge’s default permanent cease and desist order.

(D) In addition to any other penalties or remedies available, including Sections 38‑25‑320, 38‑25‑330, and 38‑25‑360, if the director believes that a person has violated a permanent cease and desist order issued by an administrative law judge, then the director may certify the relevant facts to the circuit court in any county of this State where that person has transacted business in violation of the permanent cease and desist order. The circuit court, upon its finding that the permanent cease and desist order has been violated, may order the violator to pay an additional penalty of up to twenty‑five thousand dollars for each violation.

(E) Any penalties ordered pursuant either to subsection (C) or (D) may be entered immediately by the director upon the judgment rolls in any county where that person resides or where that person has transacted business. Collection proceedings may be initiated immediately by the director.

**SECTION 38‑25‑320.** Penalty for unauthorized insurers.

An unauthorized insurer who transacts any unauthorized act of an insurance business as set forth in Article 3 of this chapter may be fined not more than fifty thousand dollars.

**SECTION 38‑25‑330.** Penalty for violation of chapter.

A person wilfully violating any provisions of this chapter is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than three years, or both.

**SECTION 38‑25‑360.** Personal liability on contracts of unauthorized insurers.

In the event of failure of an unauthorized insurer to pay any claim or loss within the provisions of the insurance contract, a person who assisted or in any manner aided directly or indirectly in the procurement of the insurance contract is liable to the insured for the full amount of the claim or loss in the manner provided by the insurance contract.

ARTICLE 7.

 GENERAL PROVISIONS

**SECTION 38‑25‑510.** Service of process on an unauthorized insurer in certain actions.

(a) Any act of transacting an insurance business as set forth in Section 38‑25‑110 by an unauthorized insurer is equivalent to and constitutes an irrevocable appointment by the insurer, binding upon him, his executor or administrator, or successor in interest if a corporation, of the Secretary of State or his successor in office to be the true and lawful attorney of the insurer upon whom may be served all lawful process in any action, suit, or proceeding in any court by the director or his designee or by the state and upon whom may be served any notice, order, pleading, or process in any proceeding before the director or his designee and which arises out of transacting an insurance business in this State by the insurer. Any act of transacting an insurance business in this State by an unauthorized insurer is signification of its agreement that any lawful process in the court action, suit, or proceeding and any notice, order, pleading, or process in the administrative proceeding before the director or his designee so served is of the same legal force and validity as personal service of process in this State upon the insurer.

(b) Service of process in the action must be made by delivering to and leaving with the Secretary of State, or some person in apparent charge of his office, two copies thereof and by payment to the Secretary of State of the fee prescribed by law. Service upon the Secretary of State as attorney is service upon the principal.

(c) The Secretary of State shall immediately forward by certified mail one of the copies of the process or the notice, order, pleading, or process in proceedings before the director or his designee to the defendant in the court proceeding or to whom the notice, order, pleading, or process in the administrative proceeding is addressed or directed at its last known principal place of business and shall keep a record of all process so served on him which shall show the day and hour of service. The service is sufficient if:

(1) Notice of the service and a copy of the court process or the notice, order, pleading, or process in the administrative proceeding are sent within ten days thereafter by certified mail by the plaintiff or the plaintiff’s attorney in the court proceeding or by the director or his designee in the administrative proceeding to the defendant in the court proceeding or to whom the notice, order, pleading, or process in the administrative proceeding is addressed or directed at the last known principal place of business of the defendant in the court or administrative proceeding.

(2) The defendant’s receipt or receipts issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person or insurer to whom the letter is addressed, and an affidavit of the plaintiff or the plaintiff’s attorney in a court proceeding or of the director or his designee in an administrative proceeding, showing compliance therewith, are filed with the clerk of court in which the action, suit, or proceeding is pending or with the director or his designee in administrative proceedings, by the date the defendant in the court or administrative proceeding is required to appear or respond thereto, or within any further time as the court or director or his designee may allow.

(d) No plaintiff is entitled to a judgment by default, a judgment with leave to prove damages, or a judgment pro confesso in any court or administrative proceeding in which court process or notice, order, pleading, or process in proceedings before the director or his designee is served under this section until the expiration of thirty days from the date of filing of the affidavit of compliance.

(e) Nothing in this section limits or affects the right to serve any process, notice, order, or demand upon any person or insurer in any other manner permitted by law.

**SECTION 38‑25‑520.** Director agent for service of process on unauthorized insurers.

(a) The issuance and delivery of a policy of insurance or contract of insurance or indemnity to any person in this State or the collection of a premium thereon by an insurer not licensed in this State, as herein required, irrevocably constitutes the director and any successor of his in office the true and lawful attorney in fact upon whom service of any and all processes, pleadings, actions, or suits arising out of the policy or contract in behalf of the insured may be made.

(b) Service of process in this action is made by delivering to and leaving with the director or some person in apparent charge of his office two copies of it and by payment to the director of 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.

(c) The director or his designee shall immediately mail by registered mail one of the copies of the process to the defendant at its last known principal place of business and shall keep a record of all process served upon him. The service of process is sufficient if: (1) notice of the service and a copy of the process are sent within ten days thereafter by registered mail by the plaintiff’s attorney to the defendant at its last known principal place of business, and (2) the defendant’s receipt or a receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff’s attorney showing compliance herewith are filed with the clerk of court in which the action is pending by the date the defendant is required to appear or within any further time which the court may allow.

(d) No plaintiff is entitled to a judgment by default, a judgment with leave to prove damages, or a judgment pro confesso under this section until the expiration of thirty days from the date of filing of the affidavit of compliance.

(e) Nothing in this section limits or abridges the right to serve any process, notice, order, or demand upon any person or insurer in any other manner permitted by law.

**SECTION 38‑25‑530.** Alternative method for service on unauthorized insurer.

Service of process in any action, suit, or proceeding involving an unauthorized insurer is, in addition to that provided in Sections 38‑25‑510 and 38‑25‑520, valid if served upon any person within this State who, in this State on behalf of the insurer, is:

(1) soliciting insurance,

(2) making any contract of insurance or issuing or delivering any policies or written contracts of insurance, or

(3) collecting or receiving any premium for the insurer, or adjusting any loss or claim for the insurance, and if counsel, within ten days after service upon the person, causes to be sent by registered mail to the last known address of the insurer a copy of the process with proper postage affixed to the envelope containing it and files an affidavit, with the clerk of court or magistrate in whose court the cause is pending, of compliance herewith, with leave to the court to extend the time for the mailing of process and filing of affidavit.

**SECTION 38‑25‑540.** Actions by unauthorized insurers.

An unauthorized insurer is not permitted to maintain any action, suit, or proceeding in this State to enforce a right, claim, or demand arising out of the transaction of insurance business until the insurer has obtained a certificate of authority to transact insurance business in this State. The unauthorized insurer may maintain an action, suit, or proceeding in connection with its investments in this State or in connection with a contract issued by it at a time when it was authorized to do business in the state where the contract was issued. This section does not prevent the insurer from defending an action in the courts of this State. The failure of an insurer transacting insurance business in this State to obtain a certificate of authority does not impair the validity of any act or contract of the insurer. This section does not apply to an eligible surplus lines insurer which maintains the deposit required by Section 38‑9‑80 or which has on file with the department a surety bond issued by an admitted insurer in an amount determined by the director or his designee to be sufficient to meet the security requirements of Section 38‑9‑80. Before an eligible surplus lines insurer files or causes to be filed any action, suit, or proceeding in this State to enforce a right, claim, or demand arising out of the transaction of insurance, it shall produce evidence that the security deposit is presently on file or that the required surety bond is then in force and effect.

**SECTION 38‑25‑550.** Prerequisites to pleading by unauthorized insurer; exemptions of eligible surplus lines insurer.

(a) Before an unauthorized insurer files or causes to be filed any pleading in any court action, suit, or proceeding or any notice, order, pleading, or process in an administrative proceeding before the director or his designee instituted against the person or insurer, the insurer shall either:

(1) Deposit with the clerk of court in which the action, suit, or proceeding is pending, or with the director or his designee in administrative proceedings before the director or his designee, cash or securities, or file with the clerk of court or the director or his designee a bond with good and sufficient sureties, to be approved by the clerk or director or his designee, in an amount to be fixed by the court or director or his designee sufficient to secure the payment of any final judgment which may be rendered in the action or administrative proceeding.

(2) Procure a certificate of authority to transact the business of insurance in this State. In considering the application of an insurer for a certificate of authority, for the purposes of this paragraph, the director or his designee need not assert the provisions of Section 38‑7‑90 against the insurer with respect to its application if he determines that the insurer would otherwise comply with the requirements for a certificate of authority.

(b) The director or his designee, in an administrative proceeding in which service is made as provided in Section 38‑25‑510, may in his discretion order a postponement as may be necessary to afford the defendant reasonable opportunity to comply with subsection (a) and to defend the action.

(c) This section does not apply to an eligible surplus lines insurer which maintains the deposit required by Section 38‑9‑80 or which has on file with the department a surety bond issued by an admitted insurer in an amount determined by the director or his designee to be sufficient to meet the security requirements of Section 38‑9‑80. Before an eligible surplus lines insurer files or causes to be filed any action, suit, or proceeding in this State to enforce a right, claim, or demand arising out of the transaction of insurance, it shall produce evidence that the security deposit is presently on file or that the required surety bond is then in force and effect.

**SECTION 38‑25‑560.** Filing of certain motions.

Nothing in this article may be construed to prevent an unauthorized insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Section 38‑25‑510, 38‑25‑520, or 38‑25‑530 on the ground that (a) no policy or contract of insurance has been issued or delivered to a citizen or resident of this State or to a corporation authorized to do business in this State, (b) the insurer has not been transacting business in this State, or (c) the person on whom service was made pursuant to Section 38‑25‑530 was not doing any of the acts listed in that section.

**SECTION 38‑25‑570.** Enforcement of foreign decrees.

(a) The Attorney General upon request of the director or his designee may proceed in the courts of this State or any reciprocal state to enforce an order or decision in any court proceeding or in any administrative proceeding before the director or his designee.

(b) As used in this section:

(1) “Reciprocal state” means any state or territory of the United States the laws of which contain procedures substantially similar to those specified in this section for the enforcement of decrees or orders in equity issued by courts located in other states or territories of the United States against an insurer incorporated or authorized to do business in that state or territory.

(2) “Foreign decree” means any decree or order in equity of a court located in a reciprocal state, including a court of the United States located therein, against any insurer incorporated or authorized to do business in this State.

(3) “Qualified party” means a state regulatory agency acting in its capacity to enforce the insurance laws of its state.

(c) The director or his designee shall determine which states and territories qualify as reciprocal states and shall maintain an up‑to‑date list of these states.

(d) A copy of any foreign decree authenticated in accordance with the law of this State may be filed in the office of the clerk of court of any Circuit Court of this State. The clerk, upon verifying with the department that the decree or order qualifies as a foreign decree, shall treat the foreign decree in the same manner as a decree of a Circuit Court of this State. A foreign decree so filed has the same effect as a decree of a Circuit Court of this State and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a decree of a Circuit Court of this State and may be enforced or satisfied in like manner.

(e)(1) At the time of the filing of the foreign decree, the Attorney General shall make and file with the clerk of court an affidavit setting forth the name and last known post office address of the defendant.

(2) Promptly upon the filing of the foreign decree and the affidavit, the clerk shall mail notice of the filing of the foreign decree to the defendant at the address given and to the department and shall make a note of the mailing in the docket. In addition, the Attorney General may mail a notice of the filing of the foreign decree to the defendant and to the department and may file proof of mailing with the clerk. Failure to mail notice of the filing by the clerk does not affect the enforcement proceedings if proof of mailing by the Attorney General has been filed.

(3) No execution or other process for enforcement of a foreign decree filed hereunder may issue for thirty days after the date the decree is filed.

(f)(1) If the defendant shows the Circuit Court that an appeal from the foreign decree is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign decree until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the defendant has furnished the security for the satisfaction of the decree required by the state in which it was rendered.

(2) If the defendant shows the Circuit Court any ground upon which enforcement of a decree of any Circuit Court of this State would be stayed, the court shall stay enforcement of the foreign decree for an appropriate period, upon requiring the same security for satisfaction of the decree which is required in this State.

(g) Any person filing a foreign decree shall pay to the clerk of court fifteen dollars. Fees for docketing, transcription, or other enforcement proceedings are as provided for decrees of the Circuit Court.