CHAPTER 5

Authority and Requirements to Transact Business

**SECTION 38‑5‑10.** Insurers must be licensed and supervised; exceptions.

 Every insurer doing business in this State must be licensed and supervised by the director or his designee, with the following exceptions:

 (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:

 (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.

 (b) [Reserved]

HISTORY: 1947 (45) 322; 1952 Code Section 37‑101; 1962 Code Section 37‑101; 1964 (53) 1796; 1976 Code Section 38‑5‑10; 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

CROSS REFERENCES

Commissioner’s certificate as evidence of authority to do business, see Section 38‑3‑230.

Corporations, generally, see Section 33‑1‑101 et seq.

Prepaid dental service, see S.C. Code of Regulations R. 69‑41.

Insider trading in securities of domestic stock insurance companies, see Section 38‑23‑10 et seq.

Insurer not authorized to operate from location within the State unless it is licensed as insurer as provided in this section, see Section 38‑5‑180.

Personal liability of brokers selling policies of unlicensed insurers, see Section 38‑45‑120.

Rights concerning the appointment of producers, as conferred by a license issued by the Commissioner pursuant to this chapter, see Section 38‑43‑40.

Service of process on foreign insurance companies, see Section 15‑9‑270.

Service of process on unauthorized insurers, see Section 15‑9‑280 et seq.

Venue of suits against insurance companies, see Section 15‑7‑70.

When producers are personally liable on contracts of unauthorized insurers, see Sections 38‑43‑170, 38‑43‑180.

Library References

Insurance 1127.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 67 to 69, 71.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law, practice and procedure. 40 S.C. L. Rev. 200 (Autumn 1988).

Attorney General’s Opinions

The Commissioner has no authority to refuse a certificate of authority solely because the applicant company does not conform to a minimum operating experience requirement set by the Insurance Commission which varies the statutory standards for admission to do business in this State. 1963‑64 Op.Atty.Gen, No 1757, p 266, 1964 WL 8375.

Where a foreign insurance company has fully satisfied the standards for admission contained in this article, the Commissioner has no authority to refuse a certificate of authority, as the statutory provisions are mandatory and allow no discretion to the Insurance Commissioner to impose any other requirement as a condition precedent to qualification to do business in this State. 1963‑64 Op.Atty.Gen, No 1757, p 266. [Under former law.], 1964 WL 8375.

NOTES OF DECISIONS

In general 1

Professional negligence 2

1. In general

This Title regulates the insurance business. Under its terms no insurance company may do business in this State unless duly licensed by the Insurance Commissioner and then only through an agent who has been duly licensed by the Commissioner (decided under former law). Taggart v. Home Finance Group, Inc. (S.C. 1961) 239 S.C. 345, 123 S.E.2d 250.

2. Professional negligence

Under South Carolina law, motorist’s failure to introduce expert testimony as to the appropriate professional standard of care for an insurance agent precluded motorist’s claim against insurance broker for professional negligence. Spires v. Acceleration Nat. Ins. Co., 2006, 417 F.Supp.2d 750. Insurance 1673

**SECTION 38‑5‑20.** Certain charitable, religious, and other corporations authorized to issue annuities or pay lump‑sum benefits without being subject to insurance laws.

 A charitable, religious, benevolent, or educational corporation, not operating for profit and in active operation for at least five years, may receive transfers of property conditioned upon its agreement to pay an annuity or lump‑sum benefit to the transferor or his nominee without being subject to the insurance laws of this State. No corporation operating for profit, including nursing homes or any other type of business, is permitted to issue charitable or gift annuities without the director’s or his designee’s approval.

HISTORY: Former 1976 Code Section 38‑5‑20 [1962 Code Section 37‑109; 1964 (53) 2051; 1968 (55) 2497; 1979 Act No. 40, Section 1; 1979 Act No. 120, Section 1] recodified as Sections 38‑1‑20, 38‑5‑30, and 38‑75‑510 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑1‑40 [1962 Code Section 37‑4; 1967 (55) 399; 1981 Act No. 182] recodified as Section 38‑5‑20 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

Library References

Annuities 30.

Westlaw Topic No. 29.

**SECTION 38‑5‑30.** Kinds of insurance for which an insurer may be licensed.

 The director or his designee may license insurers, subject to other requirements of existing insurance laws, to transact the following kinds of insurance in this State:

 (a) life insurance and annuities;

 (b) accident and health insurance;

 (c) property insurance;

 (d) casualty insurance;

 (e) surety insurance;

 (f) marine insurance;

 (g) title insurance;

 (h) multiple lines insurance, meaning any two or more of the kinds of insurance listed in items (b), (c), (d), (e), and (f).

 Each license issued is for an indefinite term unless revoked or suspended.

HISTORY: Former 1976 Code Section 38‑5‑30 [1962 Code Section 37‑109.1; 1964 (53) 2051] recodified as Section 38‑5‑40 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑20 [1962 Code Section 37‑109; 1964 (53) 2051; 1968 (55) 2407; 1979 Act No. 40, Section 1] and former Section 38‑5‑210 [1986 Act No. 540, Part II, Section 31 (H)] recodified as Section 38‑5‑30 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533; 2002 Act No. 228, Section 2, eff May 1, 2002.

CROSS REFERENCES

License fee imposed on an insurer for each kind of insurance listed in this section for which such insurer is licensed, see Section 38‑7‑10.

Title insurers, issuance of closing or settlement insurance, indemnity, premiums, see Section 38‑75‑1010.

Library References

Insurance 1129.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 166, 177.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Shipping Law Section 94, License to Transact Marine Insurance.

LAW REVIEW AND JOURNAL COMMENTARIES

Life Insurance. 24 S.C. L. Rev. 577.

Attorney General’s Opinions

The South Carolina Insurance Department has the obligation and statutory authority to regulate bail bond business. 1975‑76 Op.Atty.Gen, No 4437, p 292, 1976 WL 23054.

Group annuity contract which offers fixed annuity but premium for which may vary in accordance with investment experience of segregated premium account does not violate provisions of former Code 1962 Section 37‑109. 1963‑64 Op.Atty.Gen, No 1756, p 263, 1964 WL 8374.

Group annuity contracts are authorized under former Code 1962 Section 37‑109 and former Code 1962 Section 37‑188(4)(b)(iv). 1963‑64 Op.Atty.Gen, No 1756, p 263, 1964 WL 8374.

NOTES OF DECISIONS

Bail bonding business 1

1. Bail bonding business

Although bail bondsman is surety, it does not necessarily follow that insurance relationship, as contemplated by former Section 38‑5‑20, is created and bail bonding business does not meet definition of insurance under former Section 38‑1‑30 because purpose of bond is not to indemnify government but to secure appearance of principal to answer court and, moreover, court in its discretion may grant relief from forfeiture pursuant to Section 17‑15‑180 and, therefore, Title 38 is inapplicable to criminal bail bond business. Wilson v. McLeod (S.C. 1980) 274 S.C. 525, 265 S.E.2d 677.

**SECTION 38‑5‑40.** Kinds of insurance for which life insurer may be licensed.

 No life insurer may be licensed to write any other kinds of insurance listed in Section 38‑5‑30 except accident and health insurance. However, any life insurer licensed to transact other kinds of insurance immediately prior to March 18, 1964, shall continue to be so licensed if otherwise qualified.

HISTORY: Former 1976 Code Section 38‑5‑40 [1962 Code Section 37‑109.2; 1964 (53) 2051] recodified as Section 38‑5‑50 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑30 [1962 Code Section 37‑109.1; 1964 (53) 2051] recodified as Section 38‑5‑40 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

Library References

Insurance 1129.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 166, 177.

LAW REVIEW AND JOURNAL COMMENTARIES

Life Insurance. 24 S.C. L. Rev. 577.

**SECTION 38‑5‑50.** Certain insurers may not be licensed to write life insurance.

 No insurer licensed to write any of the kinds of insurance listed in items (c), (d), (e), (f), (g), and (h) of Section 38‑5‑30 may be licensed to write life insurance. However, any life insurer licensed to transact other kinds of insurance immediately prior to March 18, 1964, shall continue to be so licensed if otherwise qualified.

HISTORY: Former 1976 Code Section 38‑5‑50 [1947 (45) 322; 1952 Code Section 37‑102; 1962 Code Section 37‑102] recodified as Section 38‑5‑80 and Section 38‑5‑90 by 1987 Act No. 155 Section 1; Former 1976 Code Section 38‑5‑40 [1962 Code Section 37‑109.2; 1964 (53) 2051] recodified as Section 38‑5‑50 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

Library References

Insurance 1129.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 166, 177.

**SECTION 38‑5‑60.** Qualifications to become an approved reinsurer.

 For purposes of calculating deductions for reserves, insurers not licensed in this State may be approved as reinsurers by the director or his designee for an indefinite term only if:

 (1) Upon initial application a fee of four hundred dollars is enclosed, and, every two years after that time, a fee of four hundred dollars is paid by March first.

 (2) There is filed with the department a power of attorney approved as to form by the director or his designee and authorizing the director to accept service of process in behalf of the reinsurer.

 (3) There is filed with the department the reinsurer’s annual statement and the reinsurer’s most recent report of examination, and after that time each annual statement and report of examination is filed.

 (4) The reinsurer meets the capital and surplus requirements of South Carolina law with respect to the lines to be reinsured.

HISTORY: Former 1976 Code Section 38‑5‑60 [1947 (45) 322; 1952 Code Section 37‑103; 1962 Code Section 37‑103] recodified as Section 38‑5‑80 and Section 38‑5‑90 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑770 [1947 (45) 322; 1948 (45) 1734; 1949 (46) 600; 1958 (50) 1608; 1960 (51) 1554; 1962 Code Section 37‑188; 1964 (53) 1835; 1964 (53) 1835; 1969 (56) 210; 1975 (59) 182; 1978 Act No. 601; 1979 Act No. 18; 1982 Act No. 373] recodified as Section 38‑5‑60 by 1987 Act No. 155, Section 1; 1992 Act No. 501, Part II Section 11C; 1993 Act No. 181, Section 533.

CROSS REFERENCES

Allowance for a deduction from unearned premium reserves required to be maintained by insurers, where such reserves are on risks reinsured by approved reinsurers under the provisions of this section, see Section 38‑9‑170.

Allowance to domestic ceding insurer of credit for reinsurance as asset or deduction from liability on account of reinsurance ceded, see Section 38‑9‑200.

Regulation of credit insurance, see S.C. Code of Regulations R. 69‑11.1.

Insurer not authorized to operate from location within the State unless permitted to operate as approved reinsurer as provided in this section, see Section 38‑5‑180.

Title insurer’s obtaining reinsurance, see Section 38‑75‑950.

Library References

Insurance 3595.

Westlaw Topic No. 217.

C.J.S. Insurance Section 2052.

RESEARCH REFERENCES

Treatises and Practice Aids

Couch on Insurance Section 9:7, State Statutory Schemes Authorizing Various Types of Reinsurance.

**SECTION 38‑5‑70.** Appointment of director as attorney 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 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.

HISTORY: Former 1976 Code Section 38‑5‑70 [1952 Code Section 37‑104; 1947 (45) 322; 1962 Code Section 37‑104] recodified as Section 38‑5‑80 and Section 38‑5‑90 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑80 [1947 (45) 322; 1952 Code Section 37‑105; 1962 Code Section 37‑105] recodified as Section 38‑5‑70 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

CROSS REFERENCES

Manner of making service on an insurance company, see Section 15‑9‑270.

Library References

Insurance 3568.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 135 to 136, 2132 to 2134.

NOTES OF DECISIONS

In general 1

Appearance 2

1. In general

Insurance company that elected to come within the provisions of former Code 1952 Section 37‑105 by complying with its requirements is bound by those provisions. Morgan v. State Farm Mut. Ins. Co. (S.C. 1956) 229 S.C. 44, 91 S.E.2d 723.

Former Code 1962 Section 37‑105 was exclusive and service made in any other way upon such corporation is invalid. Mobley v. Bland (S.C. 1942) 200 S.C. 448, 21 S.E.2d 22.

Service on foreign insurance companies as provided for in former Code 1962 Section 37‑105 is exclusive, and service made in any other way upon such corporation is invalid. Murray v. Sovereign Camp, W. O. W. (S.C. 1939) 192 S.C. 101, 5 S.E.2d 560.

2. Appearance

Attempt by Tennessee rehabilitator, who was served pursuant to the procedure outlined in former Section 38‑5‑80, to assert the Tennessee court’s injunction in bar of plaintiff’s action, together with his request that the trial court rule that the plaintiff had elected to be bound by the Tennessee proceeding, constituted a general appearance and a waiver of the rehabilitator’s right to question the jurisdiction of the South Carolina court over his person. Smalls v. Weed (S.C.App. 1987) 291 S.C. 258, 353 S.E.2d 154, remanded 292 S.C. 408, 356 S.E.2d 843, on remand 293 S.C. 364, 360 S.E.2d 531. Appearance 8(1); Appearance 22

**SECTION 38‑5‑80.** Additional requirements for issuance of certificate or license to domestic insurer; grounds for revocation or suspension of license.

 Before granting the original certificate of authority or license to a domestic insurer to do business in this State, the director or his designee must be satisfied by proper evidence that:

 (a) The insurer is duly qualified to transact business under the laws of this State.

 (b) The insurer has filed with him an affidavit of its president or other chief officer that it has not violated this title in the past year and that it accepts the terms and obligations of this title as part of the consideration for license.

 (c) The insurer pays all taxes and performs all duties required by law.

 (d) The reserves of the insurer are adequate for the protection of policyholders of this State.

 (e) The insurer’s directors and officers are competent, trustworthy, and have a good business reputation and that none of the directors and officers have been convicted of a crime in any jurisdiction involving fraud, dishonesty, or like moral turpitude or convicted of violating an insurance statute of any jurisdiction.

 (f) The insurer has employed one or more persons residing in this State with adequate experience and training to manage properly its business and affairs.

 (g) The insurer has not entered into any management contract, agency agreement, or other agreement which may materially affect its financial condition so as to render its proceedings hazardous to the public or to its policyholders.

 (h) The insurer has made adequate reinsurance arrangements if required.

 (i) The insurer’s proposed method of operation, when considered in light of its financial condition and the absence of any prior operating experience, will not likely render its proceedings hazardous to the public or to its policyholders.

 (j) The reserve basis to be used by the insurer will be adequate for the protection of policyholders in this State.

 (k) The 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.

HISTORY: Former 1976 Code Section 38‑5‑80 [1947 (45) 322; 1952 Code Section 37‑105; 1962 Code Section 37‑105, recodified as Section 38‑5‑70 by 1987 Act No. 155, Section 1; Former 1976 Code Sections 38‑5‑50 [1947 (45) 322; 1952 Code Section 37‑102; 1962 Code Section 37‑102], 38‑5‑60 [1947 (45) 322; 1952 Code Section 37‑103; 1962 Code Section 37‑103], 38‑5‑70 [1947 (45) 322; 1952 Code Section 37‑104; 1962 Code Section 37‑104], 38‑5‑90 [1947 (45) 322; 1952 Code Section 37‑106; 1962 Code Section 37‑106], and 38‑5‑100 [1962 Code Section 37‑106.1; 1971 (57) 314] recodified as Section 38‑5‑80 by 1987 Act No. 155, Section 1; 1987 Act No. 8, Section 2; 1990 Act No. 364, Section 1; 1993 Act No. 181, Section 533; 2001 Act No. 82, Section 7, eff July 20, 2001.

CROSS REFERENCES

Department of Insurance regulations, see S.C. Code of Regulations R. 69‑1 et seq.

Library References

Insurance 1127.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 67 to 69, 71.

Attorney General’s Opinions

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. S.C. Op.Atty.Gen. (Nov. 22, 2004) 2004 WL 2745669.

NOTES OF DECISIONS

Federal courts 1

1. Federal courts

Former Code 1962 Section 37‑103 was ineffectual to deprive a foreign insurance company from exercising its constitutional right of removal to the Federal court. De Treville v. McMahan (S.C. 1926) 137 S.C. 388, 135 S.E. 356.

**SECTION 38‑5‑90.** Additional requirements for issuance of certificate or license to foreign or alien insurer; grounds for revocation or suspension of license.

 Before granting the original certificate of authority or license to a foreign or alien insurer to do business in this State, the director or his designee must be satisfied by proper evidence that:

 (a) The insurer is duly qualified to transact business under the laws of this State.

 (b) The insurer has filed with him an affidavit of its president or other chief officer that it has not violated this title in the past year and that it accepts the terms and obligations of this title as part of the consideration for license.

 (c) The insurer pays all taxes and performs all duties required by law.

 (d) The reserves of the insurer are adequate for the protection of policyholders of this State.

 (e) The insurer’s directors and officers are competent, trustworthy, and have a good business reputation.

 (f) The insurer has employed one or more persons with adequate experience and training to manage properly its business and affairs relating to its policies in South Carolina.

 (g) The insurer has not entered into any management contract, agency agreement, or other agreement which may materially affect its financial condition so as to render its proceedings hazardous to the public or to its policyholders.

 (h) The insurer has made adequate reinsurance arrangements if required.

 (i) The insurer’s proposed method of operation, when considered in light of its financial condition and the absence of any prior operating experience, will not likely render its proceedings hazardous to the public or to its policyholders.

 (j) The insurer is safe and solvent.

 (k) The insurer’s dealings are fair and equitable.

 (l) The insurer conducts its business in a manner not contrary to the public interest.

 If subsequently the director or his designee is of the opinion that a condition exists which would have prohibited him from issuing a certificate of authority or license to the insurer, then that condition also constitutes a ground for license revocation under Section 38‑5‑120.

HISTORY: Former 1976 Code Section 38‑5‑90 [1947 (45) 322; 1952 Code Section 37‑106; 1962 Code Section 37‑106, recodified as Section 38‑5‑80 and Section 38‑5‑90 by 1987 Act No. 155, Section 1; Former 1976 Code Sections 38‑5‑50 [1947 (45) 322; 1952 Code Section 37‑102; 1962 Code Section 37‑102], 38‑5‑60 [1947 (45) 322; 1952 Code Section 37‑103; 1962 Code Section 37‑103], 38‑5‑70 [1947 (45) 322; 1952 Code Section 37‑104; 1962 Code Section 37‑104], 38‑5‑90 [1947 (45) 322; 1952 Code Section 37‑106; 1962 Code Section 37‑106], 38‑5‑110 [1947 (45) 322; 1952 Code Section 37‑107; 1962 Code Section 37‑107], and 38‑5‑120 [1962 Code Section 37‑107.1; 1971 (57) 131] recodified as Section 38‑5‑90 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533; 2000 Act No. 312, Section 2.

Library References

Insurance 1165, 1175.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 127 to 131.

Attorney General’s Opinions

Operating experience might be a factor affecting such standards as the solvency of the company, and whether it conducts its business in a fair and equitable manner. 1963‑64 Op.Atty.Gen, No 1757, p 266. [Under former Section 38‑5‑90.], 1964 WL 8375.

NOTES OF DECISIONS

In general 1

1. In general

The provisions of the chapter dealing with the domestication of foreign corporations generally, do not govern the admission of foreign insurance companies to do business within the state. State v. National Postal Transport Ass’n (S.C. 1959) 234 S.C. 260, 107 S.E.2d 763. Insurance 1165

The General Assembly by enactment of the Insurance Law and its incorporation into the 1952 Code intended to vest the commissioner with the power and duty of supervising and regulating the transaction of the business of insurance within the state, including the power to authorize the transaction of such business by foreign insurance company. State v. National Postal Transport Ass’n (S.C. 1959) 234 S.C. 260, 107 S.E.2d 763. Insurance 1165

**SECTION 38‑5‑100.** Foreign or alien insurers with names identical with or similar to others not qualified.

 No foreign or alien insurer may be licensed to do business in this State when its name is identical with that of any active insurer previously licensed to do business in this State which has engaged in business therein for one year or more. No foreign or alien insurer may be licensed to do business in this State when its name is so nearly similar to that of any active insurer previously licensed to do business in this State which has engaged in business therein for one year or more so as to lead to confusion and uncertainty.

HISTORY: Former 1976 Code Section 38‑5‑100 [1962 Code Section 37‑106.1; 1971 (57) 314] recodified as Section 38‑5‑80 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑130 [1947 (45) 322; 1952 Code Section 37‑108; 1962 Code Section 37‑108] recodified as Section 38‑5‑100 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

Library References

Insurance 1165, 1175.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 127 to 131.

NOTES OF DECISIONS

In general 1

1. In general

The Insurance Commissioner, after licensing a foreign insurance company prior to the effective date of the 1947 act from which former Code 1962 Section 37‑108 was codified, had no right thereafter to refuse to relicense it on the ground of similarity of its name to that of a previously licensed company as provided in former Code 1962 Section 37‑108. Independence Ins. Co. v. Independent Life & Acc. Ins. Co. (S.C. 1950) 218 S.C. 22, 61 S.E.2d 399.

**SECTION 38‑5‑110.** Approval of charters or amendments of charter.

 It is unlawful for the Secretary of State to issue any charter or grant any amendments of charter to any insurer or permit any foreign or alien insurer to do business within this State without the written approval of the director or his designee.

HISTORY: Former 1976 Section 38‑5‑110 [1947 (45) 322; 1952 Code Section 37‑107; 1962 Code Section 37‑107] recodified as Section 38‑5‑90 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑140 [1947 (45) 322; 1952 Code Section 37‑110; 1957 (50) 92; 1962 Code Section 37‑110] recodified as Section 38‑5‑110 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

Library References

Insurance 1126, 1165, 1175.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 40, 127 to 131.

NOTES OF DECISIONS

In general 1

1. In general

So much of former Code 1962 Section 37‑110 as refers to action by the Secretary of State permitting a foreign insurance company to do business within the State, appears somewhat confusing in view of the authority in that regard conferred upon the Commissioner by Code former 1962 Sections 37‑101 and 37‑107. State v. National Postal Transport Ass’n (S.C. 1959) 234 S.C. 260, 107 S.E.2d 763.

**SECTION 38‑5‑120.** Revocation or suspension of certificate of authority; publication of notice; hearing.

 (A) The director or his designee shall revoke or suspend certificates of authority granted to an insurer and its officers and agents if he is of the opinion upon examination or other evidence that one or more of the following exist:

 (1) The insurer is in an unsound condition.

 (2) The insurer has not complied with the law or with the provisions of its charter.

 (3) The officers or agents of an insurer refuse to submit to examination or to perform a legal obligation relative to an examination.

 (4) The insurer has not complied with a lawful order of the director or his designee.

 (5) The condition of the insurer renders the continuance of its business hazardous to the general public, its creditors, or its policyholders. The director or his designee may consider one or more of the following standards to determine whether the continued operation of an insurer transacting insurance business in this State is hazardous to the general public, its creditors, or its policyholders:

 (a) adverse findings reported in financial condition and market conduct examination reports, audit reports, and actuarial opinions, reports, or summaries;

 (b) the National Association of Insurance Commissioners Insurance Regulatory Information System and its other financial analysis solvency tools and reports;

 (c) whether the insurer has made adequate provision, according to presently accepted actuarial standards of practice, for the anticipated cash flows required by the contractual obligations and related expenses of the insurer, when considered in light of the assets held by the insurer with respect to such reserves and related actuarial items including, but not limited to, the investment earnings on such assets, and the considerations anticipated to be received and retained under such policies and contracts;

 (d) whether the ability of an assuming reinsurer to perform and the reinsurance program of the insurer provides sufficient protection for the remaining surplus of the insurer after taking into account the cash flow of the insurer, the classes of business written, and the financial condition of the assuming reinsurer;

 (e) whether the operating loss of the insurer in the immediately preceding twelve month period or less is greater than fifty percent of the remaining surplus of the insurer regarding policyholders in excess of the minimum required, provided that for the purposes of this section, the operating loss of an insurer includes, but is not limited to, net capital gain or loss, change in nonadmitted assets, and cash dividends paid to shareholders;

 (f) whether the operating loss, excluding net capital gains, of the insurer in the immediately preceding twelve month period or less is greater than twenty percent of the remaining surplus of the insurer regarding policyholders in excess of the minimum required;

 (g) whether a reinsurer, obligor, or any entity within the insurance holding company system of the insurer is insolvent, threatened with insolvency, or delinquent in payment of its monetary or other obligations, and which in the opinion of the director or his designee may affect the solvency of the insurer;

 (h) contingent liabilities, pledges, or guaranties which individually or collectively involve a total amount which in the opinion of the director or his designee may affect the solvency of the insurer;

 (i) whether a controlling person of an insurer is delinquent in the transmitting to or payment of net premiums to the insurer;

 (j) the age and collectability of receivables;

 (k) whether the management of an insurer, including officers, directors, or other people who directly or indirectly control the operation of the insurer, fails to possess and demonstrate the competence, fitness, and reputation necessary to serve the insurer in that position;

 (l) whether management of an insurer has failed to respond to inquiries relative to the condition of the insurer or has furnished false and misleading information concerning an inquiry;

 (m) whether management of an insurer has filed a false or misleading sworn financial statement, released a false or misleading financial statement to lending institutions or to the general public, made a false or misleading entry, or omitted an entry of a material amount in the books of the insurer;

 (n) whether the insurer has failed to meet financial and holding company filing requirements in the absence of a reason satisfactory to the director or his designee;

 (o) whether the insurer has grown so rapidly and to an extent that it lacks adequate financial and administrative capacity to meet its obligations in a timely manner;

 (p) whether the insurer has experienced or will experience in the foreseeable future cash flow or liquidity problems;

 (q) whether management has established reserves that do not comply with minimum standards established by state insurance laws, regulations, statutory accounting standards, sound actuarial principles, and standards of practice;

 (r) whether management persistently engages in material underreserving that results in adverse development;

 (s) whether transactions among affiliates, subsidiaries, or controlling persons for which the insurer receives assets or capital gains, or both, do not provide sufficient value, liquidity, or diversity to assure the ability of the insurer to meet its outstanding obligations as they mature; and

 (t) any other finding determined by the director or his designee to be hazardous to the insurer’s policyholders, creditors, or general public.

 (B) For the purposes of making a determination of the financial condition of an insurer under this section, the director or his designee may:

 (1) disregard any credit or amount receivable resulting from transactions with a reinsurer that is insolvent, impaired, or otherwise subject to a delinquency proceeding;

 (2) make appropriate adjustments including disallowance to asset values attributable to investments in or transactions with parents, subsidiaries, or affiliates consistent with the NAIC Accounting Policies and Procedures Manual, state laws, and state regulations;

 (3) refuse to recognize the stated value of accounts receivable if the ability to collect receivables is highly speculative in view of the age of the account or the financial condition of the debtor; or

 (4) increase the liability of the insurer in an amount equal to any contingent liability, pledge, or guarantee not otherwise included if there is a substantial risk that the insurer will be called upon to meet the obligation undertaken within the next twelve month period.

 (C) The department must publish notice of revocation and suspension in a newspaper of general circulation in this State. The insurer and its agents may not conduct any new business in this State while the default or disability continues and until the director or his designee restore the authority of the insurer to transact business in this State.

 (D)(1) The insurer may request a hearing on an order or a decision made by the director or his designee pursuant to the provisions of this title. The insurer or other parties must be served with notice of the hearing stating the time and place of the hearing and the grounds upon which the director based the order; the hearing must occur not less than ten days nor more than thirty days following the notice and must be conducted at the offices of the South Carolina Department of Insurance unless otherwise designated by the director. The director or his designee shall hold all hearings in private unless the insurer requests a public hearing. After a hearing by the director or his designee, an order or a decision made, issued, or executed by the director or his designee is subject to review in accordance with Section 38‑3‑210 under the appellate procedures of the South Carolina Administrative Law Court, as provided by law.

 (2) Notwithstanding the provisions of subsection (A), if the director or his designee determines that an insurer is in an unsound condition or in a hazardous condition as provided in subsection (A)(1) or (A)(5), he may issue an order requiring the insurer to:

 (a) reduce the total amount of present and potential liability for policy benefits by reinsurance;

 (b) reduce, suspend, or limit the volume of business being accepted or renewed;

 (c) reduce general insurance and commission expenses by specified methods;

 (d) increase the insurer’s capital and surplus;

 (e) suspend or limit the declaration and payment of dividends by an insurer to its stockholders or to its policyholders;

 (f) file reports in a form acceptable to the director or his designee concerning the market value of an insurer’s assets;

 (g) limit or withdraw from certain investments or discontinue certain investment practices to the extent the director or his designee considers necessary;

 (h) document the adequacy of premium rates in relation to the risks insured;

 (i) file, in addition to regular annual statements, interim financial reports on the form adopted by the National Association of Insurance Commissioners or in a format approved by the director or his designee;

 (j) correct corporate governance practice deficiencies, and adopt and utilize governance practices acceptable to the director or his designee;

 (k) provide a business plan to the director or his designee in order to continue to transact business in the State; or

 (l) adjust rates for any nonlife insurance product written by the insurer that the director or his designee considers necessary to improve the financial condition of the insurer, notwithstanding any other provision of law limiting the frequency or amount of premium rate adjustments.

 (3) The order of the director or his designee may be limited to the extent provided by law if the insurer is a foreign insurer.

HISTORY: Former 1976 Code Section 38‑5‑120 [1962 Code Section 37‑107.1; 1971 (57) 131] recodified as Section 38‑5‑90 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑160 [1947 (45) 322; 1952 Code Section 37‑112; 1962 Code Section 37‑112] recodified as Section 38‑5‑120 by 1987 Act No. 155, 1; 1988 Act No. 374, Section 3; 1991 Act No. 13, Section 5; 1992 Act No. 277, Section 1; 1993 Act No. 181, Section 53; 2009 Act No. 27, Section 2, eff June 2, 2009; 2013 Act No. 19, Section 1, eff April 23, 2013.

CROSS REFERENCES

Application of disciplinary procedures to member company of Windstorm and Hail Underwriting Association which fails to pay assessment or interest within 30 days, see Section 38‑75‑375.

Application of the penalties provided in this section to a violation of the Long Term Care Insurance Act, see Section 38‑72‑90.

Application of this section to Special Purpose Reinsurance Vehicles, see Section 38‑14‑20.

“Enterprise risk” defined, see Section 38‑21‑10.

Own Risk and Solvency Assessment, exemptions, see Section 38‑13‑860.

Standard valuation law, see Section 38‑9‑180.

Library References

Insurance 1127.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 67 to 69, 71.

Attorney General’s Opinions

Absent amendment of notice statutes requiring notice in a newspaper of general circulation by the General Assembly, the term newspaper of general circulation cannot be extended to include online newspapers. S.C. Op.Atty.Gen. (October 21, 2015) 2015 WL 6745997.

NOTES OF DECISIONS

In general 1

Negligence 2

1. In general

Where the relator sued a foreign insurance company, which removed the cause to the Federal court, and on complaint by the relator to the Commissioner an order to show cause why the company’s license should not be revoked was issued, and on return of such order the company showed that the removal was a mistake and without any intention on its part to violate the law, and offered to consent that the case be remanded, whereupon the Commissioner refused to revoke the license, his right so to act was discretionary, and the relator had no such interest in the matter as entitled him to maintain mandamus against the Commissioner to compel him to revoke the license (decided under former law). State ex rel. Phoenix Mut. Ins. Co. v McMaster (1913) 94 SC 379, 77 SE 401, affd 237 US 63, 59 L Ed 839, 35 S Ct 504. State ex rel. Sims v McMaster (1913) 95 SC 476, 79 SE 405.

2. Negligence

Under South Carolina law, insurance broker did not make a materially false statement to insured, with respect to insurance company’s solvency and financial stability, precluding motorist’s claim for negligent misrepresentation for a pecuniary loss, stemming from motor vehicle accident in which motorist was injured by gravel truck owned and operated by insured; although the insurance company was given a “B” rating by industry’s rating organization, indicating that it was considered to be “vulnerable” due to its historically unfavorable operating performance, lack of internal capital generation, and exposure to a new and unseasoned commercial book of business, the insurance company’s South Carolina Certificate of Authority was not suspended until after termination of the renewal policy. Spires v. Acceleration Nat. Ins. Co., 2006, 417 F.Supp.2d 750. Insurance 1672

**SECTION 38‑5‑130.** Monetary penalty in lieu of license revocation or suspension.

 The director or his designee may, in lieu of license revocation or suspension as provided by Section 38‑5‑120, impose a monetary penalty as provided in Section 38‑2‑10 for each violation or failure of compliance or refusal to submit or perform as prescribed therein. Series of acts by an insurer which merely implement a basic violation and are not separate and distinct violations of an independent nature are considered to be part of the basic violation and only one penalty may be imposed thereon.

HISTORY: Former 1976 Code Section 38‑5‑130 [1947 (45) 322; 1952 Code Section 37‑108; 1962 Code Section 37‑108] recodified as 38‑5‑100 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑165 [1962 Code 37‑112.1; 1977 Act No. 61] recodified as Section 38‑5‑130 by 1987 Act No. 155, Section 1; 1988 Act No. 374, Section 4; 1993 Act No. 181, Section 533.

CROSS REFERENCES

Applicability to SPFC’s, see Section 38‑90‑430.

Application of disciplinary procedures to member company of Windstorm and Hail Underwriting Association which fails to pay assessment or interest within 30 days, see Section 38‑75‑375.

Application of the penalty provisions of this section to a violation of the Long Term Care Insurance Act, see Section 38‑72‑90.

Application of this section to Special Purpose Reinsurance Vehicles, see Section 38‑14‑20.

Library References

Insurance 1127.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 67 to 69, 71.

**SECTION 38‑5‑140.** Opportunity for hearing.

 Unless the grounds for revocation relate only to the financial condition or soundness of the insurer or to a deficiency in its assets, the director or his designee shall notify the insurer not less than thirty days before revoking its authority to do business in this State and he must specify in the notice the particulars of the alleged violation of the law or its charter or grounds for revocation and a proper opportunity must be offered the insurer to be heard.

HISTORY: Former 1976 Code Section 38‑5‑140 [1947 (45) 322; 1952 Code Section 37‑110; 1957 (50) 92; 1962 Code Section 37‑110] recodified as Section 38‑5‑110 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑170 [1947 (45) 322; 1952 Code Section 37‑113; 1962 Code Section 37‑113] recodified as Section 38‑5‑140 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

CROSS REFERENCES

Proceedings for revocation of certificate of authority for refusal to submit to examination by director, or reasonable request of examiner, to be conducted pursuant to this section, see Section 38‑13‑20.

Library References

Insurance 1055.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 53, 57 to 58.

**SECTION 38‑5‑150.** Funds may not be paid during suspension without approval.

 While the certificate of authority is suspended, no domestic insurer or any of its officers may pay out any funds belonging to the insurer without first receiving the director’s or his designee’s approval.

HISTORY: Former 1976 Code Section 38‑5‑150 [1947 (45) 322; 1952 Code Section 37‑111; 1962 Code Section 37‑111] has no comparable provisions in 1987 Act No. 155; Former 1976 Code Section 38‑5‑180 [1947 (45) 322; 1952 Code Section 37‑114; 1962 Code Section 37‑114] recodified as Section 38‑5‑150 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

Library References

Insurance 1127.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 67 to 69, 71.

**SECTION 38‑5‑160.** Injunction, receivership.

 If he considers it necessary, the director or his designee may apply to a judge of the circuit court to issue an injunction restraining a domestic insurer whose certificate of authority has been suspended, in whole or in part, from proceeding further with its business. The judge may immediately issue the injunction and, upon notice and after a full hearing of the matter, may (a) dissolve or modify the injunction or make it permanent, (b) make all orders and judgments necessary in the matter, and (c) appoint agents or a receiver to take possession of the property and effects of the insurer and to settle its affairs, subject to any rules and orders the court prescribes.

HISTORY: Former 1976 Code Section 38‑5‑160 [1947 (45) 322; 1952 Code Section 37‑112; 1962 Code Section 37‑112] recodified as Section 38‑5‑120 by 1987 Act No. 155, Section 1; Former 1976 Code Section 38‑5‑190 [1947 (45) 322; 1952 Code Section 37‑115; 1962 Code Section 37‑115] recodified as Section 38‑5‑160 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 533.

CROSS REFERENCES

Civil remedy of injunction, generally, see Rule 65, SC Rules of Civil Procedure.

Civil remedy of receivership, generally, see Section 15‑65‑10 et seq.

Library References

Insurance 1127, 1354, 1403.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 67 to 69, 71, 193 to 194, 198 to 205, 227 to 229, 250.

**SECTION 38‑5‑170.** Continuation of certificate of authority and other approvals pertaining to foreign insurer transferring its corporate domicile by merger or consolidation.

 The certificate of authority, agents’ appointments and licenses, rates, and other items which the director or his designee may allow which are in existence at the time any insurer licensed to transact the business of insurance in this State transfers its corporate domicile to this or any other state by merger, consolidation, or any other lawful method shall continue in effect upon such transfer if the insurer remains duly qualified to transact the business of insurance in this State. All outstanding policies of any transferring insurer shall remain in effect and need not be endorsed as to the new name of the company or its new location unless so ordered by the director or his designee. Every transferring insurer shall file new policy forms with the department on or before the effective date of the transfer but may use existing policy forms with appropriate endorsements if allowed by, and under conditions as approved by, the director or his designee. Every transferring insurer shall notify the director or his designee of the details of the proposed transfer and shall file promptly any resulting amendments to corporate documents filed or required to be filed with the department.

HISTORY: Former 1976 Code Section 38‑5‑170 [1947 (45) 322; 1952 Code Section 37‑113; 1962 Code Section 37‑113] recodified as Section 38‑5‑140 by 1987 Act No. 155, Section 1; New Section 38‑5‑170 enacted by 1987 Act No. 8, Section 1; 1993 Act No. 181, Section 533.

Library References

Insurance 1165, 1170.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 127 to 131.

**SECTION 38‑5‑180.** Authority required for insurer to operate in State.

 No insurer may operate from a location within South Carolina unless it is licensed as an insurer as provided in Section 38‑5‑10, or permitted to operate as an approved reinsurer as provided in Section 38‑5‑60, or qualified to operate as an eligible surplus lines insurer as provided in Section 38‑45‑90.

HISTORY: 1994 Act No. 372, Section 2.

Library References

Insurance 1126, 1165, 1175, 1330, 3590.

Westlaw Topic No. 217.

C.J.S. Insurance Sections 40, 127 to 131, 2051, 2351.

**SECTION 38‑5‑190.** Copy and reproduction of records; effect and admissibility into evidence of printed reproduction.

 Any member of South Carolina Property and Casualty Insurance Guaranty Association or South Carolina Life and Accident and Health Guaranty Association, any eligible surplus lines insurer, any insurance premium service company, any authorized reinsurer, any title insurance company, any licensed adjuster, any licensed insurance agent, any licensed insurance broker, any insurance rating or statistical agent, South Carolina Reinsurance Facility, South Carolina Wind and Hail Underwriting Association, South Carolina Property and Casualty Insurance Guaranty Association, South Carolina Health Insurance Pool, South Carolina Commercial Auto Insurance Plan, South Carolina Medical Malpractice Joint Underwriting Association, South Carolina Workers’ Compensation Commission, Second Injury Fund, South Carolina Department of Insurance, or South Carolina State Fiscal Accountability Authority Insurance Reserve Fund may cause records relating to policy applications, changes, refunds, terminations, claims, or premium payments kept by the insurer, premium service company, adjuster, agent, or broker to be copied or reproduced by:

 (1) photostatic, photographic, or microfilming process; or

 (2) electronic or graphic imaging through scanning, digitizing, or other means.

 These processes or means must correctly copy, reproduce, or form a medium for copying or reproducing the original record so that an accurate facsimile of the original can be printed or otherwise reproduced on paper, film, or similar medium. The printed reproduction must be considered an original record for all purposes and must be treated as an original record in all courts or administrative agencies for the purpose of its admissibility into evidence, regardless of whether the institution retains or disposes of the original; provided, that:

 (a) the original document otherwise qualifies as a business record pursuant to the South Carolina Uniform Business Records as Evidence Act or the appropriate state or federal rules of evidence; and

 (b) a custodian or other qualified witness, as those terms are used in the appropriate state or federal rules of evidence, certifies that the printed reproduction is a true and correct copy of the original.

 The Director of the Department of Insurance may, by order, apply the provisions of this section to any additional insurance or insurance‑related organizations or entities or insurance or insurance‑related records, as the director in his discretion considers necessary.

HISTORY: 1996 Act No. 397, Section 1.

Code Commissioner’s Note

At the direction of the Code Commissioner, references in this section to the offices of the former State Budget and Control Board, Office of the Governor, or other agencies, were changed to reflect the transfer of them to the Department of Administration or other entities, pursuant to the directive of the South Carolina Restructuring Act, 2014 Act No. 121, Section 5(D)(1), effective July 1, 2015.

Library References

Insurance 1154.

Westlaw Topic No. 217.

C.J.S. Insurance Section 41.

**SECTION 38‑5‑200.** Required use of particular insurance premium finance company or other installment plan prohibited; other prohibited acts.

 (A) An insurer, its agent, or an insurance broker doing business in this State may not require a person to use a particular insurance premium finance company or other installment plan for which a finance charge or other fee in connection with an installment payment has been or will be imposed.

 (B) An insurer, its agent, or an insurance broker doing business in this State may not refuse to issue a policy of insurance solely because the premiums for the policy have been advanced by a premium finance company licensed in this State.

 (C) An insurer or its agent doing business in this State shall not reduce commission or intimidate or retaliate against a producer, agent, broker, or insured who uses premium financing by denying the producer, agent, broker, or insured the same rights accorded producers, agents, brokers, or insureds who pay premiums in a different manner.

HISTORY: 1997 Act No. 154, Section 24.

Library References

Insurance 2072, 2075(1).

Westlaw Topic No. 217.