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DEPARTMENT OF COMMERCE AND INSURANCE
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November 21, 2017

Via E-Mail
dwbutler@mijs.com

Doug Butler
Moore Ingram Johnson & Steele, LLP

Re: Interpretive Opinion No. 08-17
Tenant Lease Agreements

Dear Mr. Butler:

The Insurance Division ("Division") of the Tennessee Department of Commerce and Insurance ("Department") is in receipt of your request for an interpretive opinion regarding whether certain scenarios would be considered insurance pursuant to Tennessee law.

The first scenario is described as the following: a property owner in the business of leasing apartments requires tenants, who enter into a standard lease agreement, to purchase general liability insurance with a limit of $100,000 that names the property owner as an "interested party" or "additional insured" for the purpose of protecting the property from damage caused by a tenant's negligence. The lease agreement also provides that the property owner will charge additional rent for each month that the tenant is in non-compliance with the requirement to purchase general liability insurance. The inquiry is whether the additional rent paid to the property owner, in instances in which the tenant failed to obtain the required general liability insurance, would constitute the transaction of insurance.

A contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss or damage of something in which the other party has an insurable interest. Tenn. Code Ann. § 56-7-101(a). Indemnity is one of the essential elements of a contract for insurance. *H & R Block E. Tax Servs., Inc. v. State, Dep't of Commerce & Ins., Div. of Ins., 267 S.W.3d 848, 860 (Tenn. Ct. App. 2008)* "Indemnity" is "[a] duty to make good any loss, damage, or liability incurred by another." *Black's Law Dictionary (10th ed. 2014).* Tennessee courts often apply a service vs. indemnity test to determine whether the core essence of a contract is a contract of service or a contract of insurance. *Id. at 856.* Moreover, in applying the test, it is important to "look[ ] behind the technical aspects of the contracts involved to the realities of the business." *Id. at 863.*

The payment of the additional rent by the tenant is not for purposes of indemnity. The payment is made by a tenant each month in which the tenant has not maintained the general liability insurance policy required by the lease agreement. The payment of the additional rent is a condition of the lease agreement and not a contract of insurance.

The second scenario is described as the same as scenario number one except that the lease agreement provides a specific option for the tenant to waive the requirement of purchasing the general liability insurance policy by instead agreeing to pay ten dollars ($10.00) per month and to indemnify the property owner for smoke, fire, explosion, water discharge, or sewer back up damage to the property that occurs as a result of the tenant's negligence. The decision by the tenant to either purchase the general liability insurance policy, or to instead pay the additional ten dollars ($10.00) per month and indemnify the property owner is a contractual issue in which the tenant may decide whether to enter into the lease agreement under either of these conditions and does not represent a contract of insurance.

The third scenario is described as the same as scenario number one except that tenants are automatically enrolled into a "property damage waiver program" ("program") and charged an additional ten dollars ($10.00) per month for enrollment. A tenant enrolled in the program will not indemnify the property owner for up to $100,000 for smoke, fire, explosion, water discharge, or sewer back up damage to the property caused by the tenant's negligence. The tenant remains liable to the property owner for any damages that exceed $100,000. A tenant who chooses to opt out of the automatic enrollment into the program is required to purchase general liability insurance on the commercial market covering such damage. The tenant's decision to either accept enrollment in the program or opt out and accept liability for any damages that exceed $100,000 is a contractual issue in which the tenant may decide whether to enter into the lease agreement under either of these conditions and does not represent a contract of insurance.

Please note that the Division has not made an independent investigation of the facts to determine the accuracy or completeness of the information supplied, but has instead relied solely upon the information you have provided. If such information is incorrect or changes substantially, it would be necessary for the Division to reconsider the matter and the position stated herein would be void. This letter expresses the Division's position on enforcement action only and does not purport to express legal conclusions on the issues presented. This position is furnished solely for the benefit and use of the entities described herein. Please be advised that further publication or use of this position may only be made with the Division's prior written consent.

This response by the Division is to a specific fact situation and should not be construed as a legal position or opinion of the Commissioner of the Tennessee Department of Commerce and Insurance or of any other official in the Department. Please note that the conclusions contained herein are based upon the representations that have been made to the Division, and any different facts or conditions might require a different response. As each inquiry is reviewed on the specific facts presented, this response is based only on such facts and may not be used as precedent by any person or entity. Any variation in the facts presented to the Division by Mr. Doug Butler could result in a different conclusion than asserted herein.

If you have further questions or concerns regarding this letter, please feel free to contact me.

Sincerely,

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