

BEFORE ALLAN L. MCVEY, INSURANCE COMMISSIONER
OF THE STATE OF WEST VIRGINIA

In the Matter of:

FIRST CONTINENTAL LIFE & ACCIDENT INSURANCE COMPANY

Administrative Proceeding No.22-IC-02433

CONSENT ORDER

In lieu of proceeding with an administrative complaint and holding a hearing, the parties hereto have reached a resolution of the matters at issue and desire that a Consent Order be entered accordingly. First Continental Life & Accident Insurance Company (“First Continental”), understands and agrees that by agreeing to the entry of this Consent Order it waives all rights to an administrative hearing and to judicial review of this matter. Further, First Continental, understands and agrees that by agreeing to the entry of this Consent Order it also agrees to the administrative action taken against it as is reflected in the Consent Order. Finally, the Insurance Commissioner for the State of West Virginia (“Commissioner”) believes the entry of this Consent Order is appropriate and in the public interest.

JURISDICTION AND APPLICABLE LAW

The Commissioner has jurisdiction over the subject matter of this action and over First Continental pursuant to Chapter 33 of the West Virginia Code, including, but not limited to, W.Va. Code § 33-44-4(a) which states:

It is unlawful for any person to engage in any act which constitutes the transaction of insurance under the provisions of this article unless authorized by a license in force pursuant to the laws of this state, or unless exempted by the insurance laws of this state. Any person or insurer engaged in any act which constitutes the unauthorized transaction of insurance shall be subject to the

provisions contained in chapter thirty-three [§§ 33-1-1 et seq.] of the code and the provisions and penalties set forth in this article.

Further, W.Va. Code § 33-3-1 states, in pertinent part:

(a) No person may act as an insurer and no insurer may transact insurance in West Virginia except as authorized by a valid license issued by the commissioner, except as to the transactions as are expressly otherwise provided for in this chapter....

(e) Any officer, director, agent, representative or employee of any insurer who willfully authorizes, negotiates, makes or issues any insurance contract in violation of this section is subject to the provisions set forth in article forty-four [§ 33-44-1 et seq.] of this chapter.

W.Va. Code § 33-6-8 requires the group certificate forms to be filed with the Commissioner. In particular, W.Va. Code § 33-6-8(a) states:

No insurance policy form, no group certificate form, no insurance application form where a written application is required and is to be made a part of the policy and no rider, endorsement or other form to be attached to any policy shall be delivered or issued for delivery in this state by an insurer unless it has been filed with the commissioner and, to the extent required by subdivision (1), subsection (b) of this section, approved by the commissioner, except that as to group insurance policies delivered outside this state, only the group certificates to be delivered or issued for delivery in this state shall be filed for approval with the commissioner. This section does not apply to policies, riders, endorsements or forms of unique character designed for and used with relation to insurance upon a particular subject, or which relate to the manner of distribution of benefits or to the reservation of rights and benefits under life or accident and sickness insurance policies, and are used at the request of the individual policyholder, contract holder or certificate holder, nor to the surety bond forms.

The transaction of insurance is defined in W.Va. Code § 33-44-3(p) which states:

(p) "Transaction of insurance" means that for purposes of this article, any of the following acts in this state effected by mail or otherwise is considered to constitute the transaction of an insurance business in or from this state:

- (1) The making of or proposing to make 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 an application for insurance;
- (4) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration required for obtaining or renewing insurance;
- (5) The issuance or delivery in this state of certificates or contracts of insurance to residents of this state or to persons authorized to do business in this state;
- (6) The solicitation, negotiation, procurement or effectuation of insurance or renewals thereof;
- (7) The dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks, the fixing of rates or investigation or adjustment of claims or losses or the transaction of matters subsequent to effectuation of the contract and arising out of it, or any other manner of representing or assisting a person or insurer in the transaction of insurance with respect to any risk or exposure located or to be performed in this state;
- (8) The transaction of any kind of insurance business specifically recognized as transacting an insurance business within the meaning of the statutes relating to insurance;
- (9) The offering of insurance or the transacting of insurance business; or
- (10) Offering an agreement or contract which purports to alter, amend or void coverage of an insurance contract.

West Virginia Code requires insurers to pay premium taxes to the State of West Virginia annually. In particular, W.Va. Code § 33-3-14(a) states:

Every insurer transacting insurance in West Virginia shall file with the commissioner, on or before March 1, each year, a financial statement made under oath of its president or secretary and on a form prescribed by the commissioner. The insurer shall also, on or before March 1 of each year subject to the provisions of §33-3-14c of this code, under the oath of its president or secretary, make a premium tax return for the previous calendar year on a form prescribed by the commissioner showing the gross amount of direct premiums, whether designated as a premium or by some other name, collected, and received by it during the previous calendar year on policies covering risks resident, located, or to be performed in this state and compute the amount of premium tax chargeable to it in accordance with the provisions of this article, deducting the amount of quarterly payments as required to be made pursuant to the provisions of §33-3-14c of this code, if any, less any adjustments to the gross amount of the direct premiums made during the calendar year, if any, and transmit with the return to the commissioner a remittance in full for the tax due. **The tax is the sum equal to two percent of the taxable premium and also includes any additional tax due under §33-3-14a of this code.** All taxes, except those received on write your own federal flood insurance premium taxes or private market flood insurance premium taxes, received by the commissioner shall be paid into the insurance tax fund created in §33-3-14(b) of this code. (emphasis added).

In addition, W.Va. Code § 33-3-14a states, in pertinent part, “For the purpose of providing additional revenue for the state General Revenue Fund, there is hereby levied and imposed, in addition to the taxes imposed by §33-3-14 of this code, **an additional premium tax equal to one percent of taxable premiums.**” (emphasis added).

The West Virginia Code contains penalties for the failure to file a return and pay the tax liability as set forth in W.Va. Code § 33-43-7 which states:

(a) If any taxpayer fails to file a return by the applicable filing date, then for each day throughout which the taxpayer fails to file, the

taxpayer is liable for a civil penalty of twenty-five dollars: Provided, That the commissioner may waive or reduce this penalty if the commissioner determines that the failure to timely file was caused by excusable neglect.

(b) If a taxpayer fails to pay a tax liability in full by the applicable payment date, then for each day throughout which a portion of the liability remains unpaid, the taxpayer is liable for a civil penalty in an amount equal to one percent of the unpaid portion: Provided, That the sum of the penalties imposed under this subsection may not exceed one hundred percent of the tax liability: Provided, however, That this penalty may be waived or reduced if the taxpayer establishes, to the satisfaction of the commissioner, that the failure upon which the penalty is based was not, in whole or in part, willful or due to the neglect of the taxpayer.

(c) The assessment of a penalty under this section is automatic unless a waiver or reduction of the penalty is agreed to by the commissioner in writing.

In addition to the penalties for failing to pay the required premium taxes, the Unauthorized Insurers Act contains penalties for doing business in West Virginia without a license. W.Va. Code § 33-44-7(a) states:

Any person engaged in any act which constitutes the unauthorized transaction of insurance as set forth in this article may, after notice and hearing pursuant to section thirteen [§ 33-2-13], article two of this chapter, be fined by the commissioner a sum not to exceed twenty thousand dollars for each unauthorized act or transaction of unauthorized insurance.

Further, W.Va. Code § 33-44-4(c) states, “An unauthorized insurer shall be bound by the terms of the insurance contract, certificate or agreement as if the contract, certificate or agreement were legally procured under the insurance laws of this state.”

The West Virginia Code of State Rules requires an insurer to submit evidence of an association’s eligibility prior to offering a group accident and sickness insurance policy to an association as set forth in W.Va. Code R. § 114-39-9 which states:

§ 114-39-9. Eligibility of Associations.

9.1. Prior to offering a group accident and sickness insurance policy to an association, an insurer must submit evidence to the commissioner that the association meets the requirements under W. Va. Code §§33-16-1a(a) or 33-16-2(b). The commissioner shall review the evidence and may request additional evidence as needed.

9.2. An insurer shall submit to the commissioner within thirty (30) days any changes in the evidence submitted under subsection 9.1 of this section.

9.3. The commissioner may order an insurer to cease offering accident and sickness insurance to an association if the commissioner determines that the association does not satisfy the requirements under W.Va. Code §§33-16-1 et seq.

W.Va. Code § 33-2-9(o)(2) requires all insurers to pay an annual examination fee which states:

(2) All insurers other than property and casualty insurers subject to the provisions of this section shall annually pay to the commissioner on or before the first day of July, one thousand nine hundred ninety-one, and every first day of July thereafter an examination assessment fee of eight hundred dollars. Four hundred fifty dollars of this fee shall be paid to the Treasurer of the state to the credit the Commissioner's Examination Revolving Fund and three hundred fifty dollars shall be paid to the Treasurer of the state. The commissioner may at his or her discretion, upon notice to the insurers subject to this subsection, increase this examination assessment fee or levy an additional examination assessment fee of two hundred fifty dollars. In no event may the total examination assessment fee, including any additional examination assessment fee levied, exceed one thousand five hundred dollars per insurer in any calendar year.

EFFECT ON THIRD PARTIES

This Consent Order does not vest standing in any third party with respect to the terms hereof, nor create for any person, other than the Commissioner, a right to enforce its terms.

FACTS

First Continental was first licensed to transact insurance in West Virginia on September 28, 1982. However, by an Order dated May 14, 2004 the Commissioner revoked First Continental's license to transact insurance in West Virginia due to the company's poor financial condition. First Continental has not had a license to transact insurance in West Virginia since that 2004 Order was entered.

The Commissioner has determined that First Continental wrote premiums in West Virginia from 2019 to 2021 while not having a license to transact insurance. Further, First Continental has not paid the premium taxes required by law for the total premiums written in West Virginia. The Commissioner has calculated the premium taxes owed as follows:

- Tax year 2019 = \$2,864.82
- Tax year 2020 = \$1,853.64
- Tax year 2021 = \$4,939.80
- Total taxes due = \$9,658.26

In addition to the premium taxes owed, penalties for failing to file a return pursuant to W.Va. Code § 33-43-7(a) and penalties for failing to pay the tax liabilities pursuant to W.Va. Code § 33-43-7(b) have been assessed as follows:

- Tax year 2019 penalties = \$28,264.82
- Tax year 2020 penalties = \$18,128.64
- Tax year 2021 penalties = \$12,089.80
- Total penalties due = \$58,483.26
- **TOTAL TAXES AND PENALTIES = \$68,141.52**

Based upon information received from First Continental, the company has collected premiums in West Virginia in 2022 of over \$119,000.00. Further, from 2019 to the present First Continental issued approximately 792 certificates to members in West Virginia. The West Virginia members received certificates from two Group Policies issued to two Group Associations, the Association for Better Health (ABH) and the Service Industry Trade Alliance (SITA).

AGREED ACTION

By agreeing to and executing this Consent Order, First Continental agrees to and requests the entry of this Consent Order. First Continental acknowledges that the Commissioner would likely prevail at a hearing against First Continental resulting in a civil penalty not to exceed Twenty Thousand Dollars (\$20,000.00) **per violation** pursuant to W.Va. Code § 33-44-7(a).

First Continental consents and agrees to the imposition of and payment to the Commissioner of an administrative fine in the amount of Eighty Thousand Dollars (\$80,000.00) for transacting insurance in West Virginia without a license. Said amount is to be paid within 30 days of the entry of this Order.

First Continental consents and agrees to pay to the Commissioner the total taxes due for tax years 2019, 2020, and 2021 in the amount of Nine Thousand Six Hundred Fifty-Eight Dollars and Twenty-Six cents (\$9,658.26) as set forth above to be paid within 30 days of the entry of this Order.

Pursuant to W.Va. Code § 33-43-7, the Commissioner agrees to waive the penalties for failing to file a return and for failing to pay the tax liability for the tax years 2019, 2020, and 2021 in the amount of Fifty-Eight Thousand, Four Hundred Eighty-Three Dollars and Twenty-Six cents (\$58,483.26).

First Continental consents and agrees to file the required premium tax forms for tax year 2022 and pay the appropriate premium taxes owed to the State of West Virginia which were due on or before March 1, 2023. The filing and the payment of the premium tax for tax year 2022 shall be done on or before March 17, 2023.

First Continental consents and agrees that pursuant to W.Va. Code § 33-44-4(c) it shall be bound by the terms of the insurance contract, certificate, or agreement as if the contract, certificate, or agreement were legally procured under the insurance laws of the State of West Virginia.

First Continental consents and agrees to pay to the Commissioner the total examination fees set forth above in the amount of Three-Thousand, Two Hundred Dollars (\$3,200.00) pursuant to W.Va. Code § 33-2-9(o)(2) to be paid within 30 days of the entry of this Order.

FINAL DISPOSITION

This Consent Order constitutes the final disposition, except for any enforcement actions with respect to this order as may be necessary, of Administrative Proceeding No. 22-IC-02433.

MISCELLANEOUS PROVISIONS

Jurisdiction of this matter is retained by the Commissioner for enforcement of this Consent Order. Any party hereto may apply to the Commissioner for such further orders and directions as may be necessary or appropriate with respect to the construction and enforcement of this Consent Order. The remedies in this Consent Order are cumulative and in addition to any other remedies the Commissioner may have at law or equity. Nothing herein shall be construed to prevent the Commissioner from commencing any action for conduct not addressed hereunder, even though such conduct may also violate this Consent Order.

First Continental understands that this is an action taken against it and that this Consent Order will be reported to the database maintained by the National Association of Insurance Commissioners (NAIC) and otherwise be made public in accordance with law.

ORDER

Inasmuch as the Commissioner finds and concludes, based upon the foregoing, that First Continental violated W.Va. Code §§ 33-3-1, 33-3-14, 33-3-14a, 33-43-7 and the Unauthorized Insurers Act, 33-44-1, *et. seq.*, it is hereby **ORDERED**:

1. First Continental shall cease and desist from transacting insurance in the State of West Virginia until such time as it has obtained a license from the Commissioner to conduct the business of insurance in this State.

2. First Continental shall maintain, pay claims, and be bound by the terms of any insurance contract, certificate, or agreement it has issued in the State of West Virginia as of the date of this Order as if the contract, certificate, or agreement were legally procured under the insurance laws of this State.

3. First Continental shall pay to the Commissioner an administrative fine in the amount of Eighty Thousand Dollars (\$80,000.00) for transacting insurance in West Virginia without a license. Said amount is to be paid within 30 days of the entry of this Order.


4. First Continental shall pay to the Commissioner the total taxes due for tax years 2019, 2020, and 2021 in the amount of Nine Thousand Six Hundred Fifty-Eight Dollars and Twenty-Six cents (\$9,658.26) as set forth above to be paid within 30 days of the entry of this Order.

5. Pursuant to W.Va. Code § 33-43-7, the Commissioner hereby waives the penalties for failing to file a return and for failing to pay the tax liability for the tax years 2019, 2020, and 2021 in the amount of Fifty-Eight Thousand, Four Hundred Eighty-Three Dollars and Twenty-Six cents (\$58,483.26).

6. First Continental shall file the required premium tax forms for tax year 2022 and pay the appropriate premium taxes owed to the State of West Virginia which were due on or before March 1, 2023. The filing and the payment of the premium tax for tax year 2022 shall be done on or before March 17, 2023.

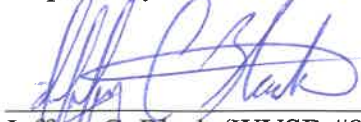
7. First Continental shall pay to the Commissioner the total examination fees set forth above in the amount of Three-Thousand, Two Hundred Dollars (\$3,200.00) pursuant to W.Va. Code § 33-2-9(o)(2) to be paid within 30 days of the entry of this Order.

ENTERED on this 17th day of March 2023.



Allan L. McVey
CPCU, ARM, AAI, AAM, AIS
Insurance Commissioner

Prepared by:



Jeffrey C. Black (WVSB #8188)
Attorney Supervisor, Regulatory Compliance
Legal Division
West Virginia Offices of the Insurance Commissioner
Post Office Box 50540
Charleston, West Virginia 25305-0540

Reviewed and agreed to by:

FIRST CONTINENTAL LIFE & ACCIDENT INSURANCE COMPANY

By: James A. Taylor

Print Name

Its: President

Signature: [Handwritten Signature]

Date: 3/14/2023