

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

In the Matter of the Appeal of)	
)	
Columbus Life Insurance Company,)	
NAIC #99937)	
)	
Integrity Life Insurance Company,)	Docket No. 4777-APP
NAIC #74780)	
)	
Western-Southern Life Assurance Company,)	
NAIC #92622)	
)	
Appellants.)	

Final Order

On January 29, 2018, the above captioned matter comes on for hearing. The appellants, Columbus Life Insurance Company, Integrity Life Insurance Company, and Western-Southern Life Assurance Company (collectively "Appellants"), appear through Lucky DeFries. The Kansas Insurance Department ("Department") appears through counsel Susan Ellmaker and Elizabeth Fike. Hearing Officer Clark Shultz, Assistant Commissioner of Insurance presided over the matter and was assisted by Grace Lancaster, staff attorney for the Kansas Insurance Department.

This matter comes before the Hearing Officer as a result of an Appeal concerning the appointment of agents and the proper interpretation of the Kansas retaliatory tax statute in K.S.A. 40-253. The hearing shall be governed by K.S.A. 40-2115 and K.S.A. 40-281. The hearing Officer hereby asserts the following findings of fact, conclusions of law and orders as follows:

FINDINGS OF PUBLIC INTEREST AND POLICY

The following action is appropriate to promote the equity and integrity of the insurance business.

STIPULATED FACTS

1. Columbus Life Insurance Company, Integrity Life Insurance Company, and Western-Southern Life Assurance Company ("Companies") are Ohio Companies authorized to do business in Kansas.
2. The Companies withdraw their claims that they are entitled to refunds of retaliatory tax for agent terminations for 2011 and 2012.
3. The Companies withdraw their claim for refund of retaliatory tax agent appointment and renewal fees for 2011.
4. The parties stipulate that a substantive determination on the method of calculation of retaliatory tax for the 2012 returns in the instant case will be applied to the Companies' 2013 returns.
5. Each month, the Kansas Insurance Department bills the Companies a \$5.00 fee for agents and agencies appointed in the previous month.
6. During 2012, Kansas charged a fee of \$5.00 for each agent or agency appointed or renewed.
7. During 2012, Ohio charged a fee of \$20.00 for each agent or agency appointed or renewed.
8. Kansas automatically certifies and charges fees for all affiliated agents when a company appoints an agency.
9. During 2012, there were occasions when the Companies appointed individual agents without appointing the agencies with which they were affiliated.
10. When the Companies appointed individual agents without appointing the agencies with which they were affiliated, a fee of \$5.00 was charged for the individual agent.
11. In calculating the retaliatory tax due, Kansas auto-populated the number of individual agents and automatically certifies agents affiliated with appointed or renewed agencies based on data supplied by the Companies and the agencies to the Department throughout the year.
12. Kansas does not charge for each line of authority authorized.

13. Ohio does not automatically certify all agents affiliated with an agency when the agency is appointed.
14. Ohio requires an agency to be appointed when an affiliated agent is appointed.
15. Kansas does not require an agency be appointed when an affiliated agent is appointed.
16. The Companies paid the taxes due for 2012 based on the KID calculation.
17. In February 2015, the Companies filed amended returns for 2012.
18. Based on the amended returns, the Companies requested refunds of all or a portion of the retaliatory taxes paid for 2012.
19. KID denied the requests of the Companies to file these amended 2012 returns and the Companies filed this appeal.

ISSUES IN CONSIDERATION

1. Should affiliated agents of certified agencies be counted for retaliatory tax purposes?
2. Should Appellants be allowed to amend their filing as other companies have been allowed to do in the past?

CONCLUSIONS OF LAW

A. Should affiliated agents of certified agents be counted for retaliatory tax purposes?

The first issue is whether the Department appropriate applied K.S.A. 40-253 with regard to fees paid upon appointment of an agent. In 1997 the Kansas Legislature last amended the Retaliatory Tax statute, K.S.A. 40-253. The amended statute states in pertinent part:

Whenever the existing or future laws of any other state or country shall require from insurance companies or fraternal benefit societies organized under the laws of this state, applying to do business in such other state or country, any deposit of securities in such state or country for the protection of policyholder therein or any payment for . . . fees, . . . then, and in every case, all companies and agents of any such state or country, doing business in this state shall make the same deposit, **for like purpose**, with the commissioner of insurance of this state, and pay to the commissioner of insurance for . . . fees . . . an amount equal to the

amount of such charges and payments imposed by the laws of such other state or country upon the companies of this state and the agents thereof.

Since retaliatory taxes are a function of the various state laws, which give rise to the need for retaliatory taxes, a consideration of both Kansas and Ohio law must be undertaken. In the instant case, the question to be addressed is whether the fees in Ohio are "for like purpose" as the fees in Kansas. If so, the agent appointment fees paid by the Ohio domiciled companies operating in Kansas should be aggregated against the fees paid by a like Kansas domiciled company operating in Ohio. The difference shall be used in calculating the proper retaliatory tax.

In Ohio an agent is appointed when an insurer files "a notice of appointment with the superintendent of insurance not later than thirty days after the date the agency contract is executed or the first insurance application is submitted, whichever is earlier." Ohio Rev. Code. Ann. § 3905.20. Once the agent is appointed, a fee is levied in an amount not more than twenty dollars. Ohio Rev. Code. Ann. § 3905.40. Ohio does not have a provision for appointments by agency.

In Kansas, K.S.A. 40-4912 allows two ways to appoint an agent:

(a) Any company authorized to transact business in this state may, upon determining that the insurance agent is of good business reputation and, if an individual, has had experience in insurance or will immediately receive a course of instruction in insurance and on the policies and policy forms of such company, appoint such insurance agent as the insurance agent of the company under the license in effect for the insurance agent.

(b) Certification of other than an individual insurance agent will automatically include each licensed agent who is an officer, director, partner, employee or otherwise legally associated with the corporation, association, partnership or other legal entity appointed by the company.

A nonrefundable fee of \$5 is collected against the company pursuant to K.S.A. 40-4912 and K.S.A. 40-252.

It should be noted that the Appellants are not arguing the constitutionality of the agency appointment structure, nor are they arguing the constitutionality of the retaliatory tax. Rather, the Appellants argue the Department has erred in its interpretation and implementation of K.S.A. 40-253. Their principal argument is that while all agent appointments lead to the same result (namely that the agent has the same authority to transact business on behalf of the company), not all appointed agents should be counted when calculating retaliatory tax. Appellants claim that when calculating retaliatory tax, greater attention must be given to the way in which the appointment occurred. In their assumption there are two classes of appointments. The first being agents whom are directly appointed, and the second being those agents whose appointments are via an affiliated agency appointment. Since Ohio does not have a system for the latter, those agents appointed by agency affiliation should not be counted when calculating a company's retaliatory tax. Therefore, only like classes of agents should be subject to a retaliatory tax.

However, to exclude some appointed agents from the retaliatory tax calculation would be to diverge from the Kansas Supreme Court's longstanding interpretation of the Kansas retaliatory tax statute. The court in Phoenix Ins. Co. of New York v. Welch, 29 Kan. 672, 674-75 (1883) summarized the intent behind the statute as follows:

This provision is called in insurance circles a "retaliatory clause." It seems to us more justly to be deemed a provision for reciprocity. It says, in effect, that while we welcome all insurance corporations of other states to the transaction of business within our limits, we insist upon a like welcome elsewhere, and that if other states shall attempt, directly or indirectly, to debar our corporations from the transaction of insurance business within their borders, we shall meet their corporations with the same restrictions and disability. It is, in brief, an appeal for comity; a demand for equality. As such, it is manifestly fair and just. It arouses no sense of injustice, and simply says to every other state in the Union: "We will meet you on the basis of equality and comity, and will treat you as you treat us." *Id.*

To permit an interpretation that allows retaliatory tax only for like classes would not accomplish the purpose of the statute as described in *Phoenix*. For if Ohio companies were not required to pay a retaliatory fee for all affiliated appointed agents, then what is to stop them from bypassing the whole retaliatory tax structure by exclusively using affiliated appointments? Subsequently, Ohio could effectively charge Kansas companies operating in Ohio more than Kansas would charge Ohio companies operating in Kansas, defeating the comity between states and, therefore, the intent of K.S.A. 40-253.

Furthermore, the question addressed in K.S.A. 40-253 is not whether the method to achieve the purpose is the same but whether the fee is levied for like purpose. In both states the fee is meant to be imposed for the appointment of agents. Once appointed, there is no difference in authority between affiliated appointed or directly appointed agents. They all have the authority to sell, solicit or negotiate any product for the insurer. To this end, Appellant's argument fails. Therefore, all agents appointed either individually or by affiliation should be counted for retaliatory tax purposes.

B. Should Appellants be allowed to amend their filing as other companies have been allowed to do in the past?

Appellants further argue that, assuming agents appointed through affiliations are to be taxed pursuant to the Department's interpretation of the statute, those agents should be able to amend their filings in a manner consistent previous practice, pointing to three Connecticut companies which have been able to amend their filings in the past. However, K.S.A.40-4912(a) is clear that the fee shall be nonrefundable once the appointment is made. While previous companies have been allowed to amend their filing in the past, the Department has indicated this was in error and revised their practice. The Department is under no obligation waive its legislative mandate due to prior erroneous practices. Therefore, Appellants request to amend their filings is denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Department correctly applied the law as is laid out in K.S.A. 40-253;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the appointment fees paid shall not be refunded to the Appellants.



Clark Shultz
Assistant Commissioner

Dated this 2nd day of April 2018.

NOTICE OF RIGHTS

Pursuant to K.S.A. 77-602 et seq., Appellants are entitled to judicial review of this Final Order. The petition for judicial review must be filed within thirty (30) days of service of this Final Order (plus three (3) days for services by mail pursuant to K.S.A. 77-531). In the event Appellants file a petition for judicial review pursuant to K.S.A. 77-613(e) , the Agency Officer to be served on behalf of the Kansas Insurance Department is:

Diane Minear, General Counsel
Kansas Insurance Department
420 S.W. 9th Street
Topeka, Kansas 66612

Certificate of Service

The undersigned hereby certifies she served a true and correct copy of the above and foregoing **Final Order** on this 21st day of April, 2018, by causing the same to be deposited in the United States Mail, first class postage prepaid, addressed to the following:

S. Lucky DeFries
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534 S. Kansas Avenue, Suite 925
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Counsel for the Appellants

And hand delivered to the following:

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Toni Garrard
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