

May 8, 1995

The Honorable Eugene Imai
Comptroller
Department of Accounting and General Services
State of Hawaii
P.O. Box 119
Honolulu, Hawaii 96810

Attention: Mr. John Takamune
Risk Management Officer

Dear Mr. Imai:

Re: Reinsurance of the State of Hawaii

This is in response to the letter to then Attorney General Robert A. Marks dated October 31, 1994, in which your predecessor requested a legal opinion with respect to an inquiry from a reinsurance company regarding its status as a reinsurer if it provided third party liability coverage of "\$5 million in limits, attaching over a \$3 million self-insured retention," for the State's liability exposures. In its letter dated October 12, 1994, the reinsurance company characterizes its proposal as one to provide reinsurance to a self-insured entity (the State). We note that the initial inquiry was directed to the Insurance Division of the Department of Commerce and Consumer Affairs, which in turn recommended that you seek a legal opinion from our office.

After discussions with your Risk Management Officer, Mr. John Takamune, and the Insurance Division, we understand the questions to be as follows:

Can a reinsurer retain the status of a reinsurer while providing coverage to the State for its third party liability exposure?

Is insurance provided to the State, which is self-insured, insurance or reinsurance?

The distinction between insurance and reinsurance is significant for two reasons. First, as noted below, insurers are generally licensed by the State and the State regulates numerous aspects of the insurer's business, including the contents of insurance policies and the rates charged for insurance. The business of reinsurance is not so regulated. Second, section 431:7-202, Hawaii Revised Statutes, provides for a tax on premiums paid for most contracts of direct insurance but premiums for reinsurance are not taxed.

In brief, we answer the first question in the affirmative. A company can be both an insurer and a reinsurer (with only the former being licensed and regulated by the State), and the status of a company, at any given time, depends on the type of coverage being provided and the nature of the insured. An entity providing third-party liability insurance to a self-insured entity is an insurer, not a reinsurer, and thus must comply with all applicable laws.¹ ([top](#))

In answer to the second question, insurance provided to the State for the State's third-party liability exposure is insurance, not reinsurance.

Self-insurance and liability insurance are defined as follows:

Self-insurance. The practice of setting aside a fund to meet losses instead of insuring against such through insurance. A common practice of business is to self-insure up to a certain amount, and then to cover any excess with insurance. Workers' compensation obligations may also be met through this method if statutory requirements are met.

Black's Law Dictionary 1360 (6th ed. 1990).

Liability insurance. Insurance that covers suits against the insured for such damages as injury or death to other drivers or passengers, property damage, and the like. It is insurance for those damages for which the driver can be held liable.

Liability insurance is that form of insurance which indemnifies against liability on account of injuries to the person or property of another. It is distinguished from "indemnity insurance" . . . , and may be issued to cover the liability of, for example, carriers, contractors, employers, landlords, manufacturers, drivers.

Black's Law Dictionary 805 (6th ed. 1990). ([top](#))

Liability insurance is often referred to as third-party liability insurance because it is a contract between two parties (the insurance company and the insured) in which coverage is provided for one's party liability to those not parties to the contract (i.e., third parties).

The Hawaii Supreme Court distinguished third-party insurance from first-party insurance as follows:

"first-party" policy provides coverage for loss or damage sustained by the insured (e.g., life, disability, health, fire, theft, and casualty insurance) whereby the insurer usually promises to pay money to the insured upon the happening of the risk insured against. A "third-party" policy, on the other hand, provides coverage for the insured's liability to another (e.g, CGL, directors' and officers' liability, and errors and omissions insurance) wherein the carrier generally assumes a contractual duty to pay judgments recovered against the insured arising from the insured's negligence.

Sentinel Ins. A., Ltd. v. First Ins. Co. of Hawaii, Ltd., 76 Haw. 277, 289, 875 P.2d 894, 906 (1994)(emphases in original). ([top](#))

Section 431:1-101, Hawaii Revised Statutes, provides that "[n]o person shall transact a business of insurance in this State without complying with the applicable provisions of [chapter 431]." Section 431:8-201 exempts reinsurance from these requirements stating that "[i]t shall be unlawful for any insurer to transact an insurance business in this State, as defined in section 431:1-215, without a certificate of authority; provided, however, that this section shall not apply to . . . [t]he lawful transaction of reinsurance by insurers" Thus, the applicability of the insurance laws to a transaction depends on whether that transaction is considered to be one in which insurance is provided or one in which reinsurance is provided. ([top](#))

Reinsurance is defined by section 431:3-109, Hawaii Revised Statutes, as "an insurance transaction where an insurer, for consideration, transfers any portion of the risk it has assumed to another insurer." Insurer is defined by section 431:1-202, Hawaii Revised Statutes, to mean "every person engaged in the business of making contracts of insurance"

Reinsurance, as defined by Hawaii law, is available only to insurers. The question you have asked requires an analysis of whether the State would be considered an insurer such that any insurance purchased by it would be reinsurance.

Although the State has the authority to buy insurance (see chapter 41D), generally the State is self-insured. "A self-insurer is not an insurer." Orkin Exterminating Co. v. Robles, 128 Ariz. 132, 134, 624 P.2d 329, 331 (App. 1981). An employer who is self-insured but who obtains excess insurance for workers' compensation coverage is not converted by those actions into an insurer as that term is defined in the insurance laws. The policy of excess insurance is "not one of reinsurance, which has been defined as a contract that one insurer makes with another to protect the first insurer from a risk it has already assumed." Zinke-Smith, Inc. v. Florida Ins. Guar. Ass'n,

304 So. 2d 507, 509 (Fla. Dist. Ct. App. 1974), cert. denied, 315 So. 2d 469 (Fla. 1975) (emphases in original). See also *Stamp v. Dept. of Labor and Industries*, 859 P.2d 597 (Wash. 1993). The court in *Zinke-Smith* likened a self-insured who purchased excess insurance to an insured covered by direct insurance with a deductible. In the latter situation, the insured can be considered to be self-insured up to the amount of the deductible and, as the court noted, "[n]o one has yet to suggest in such instances that the insured, being self-insured up to the amount of the deductible, is an 'insurer' who has merely 'reinsured' the risk above a certain limit." *Zinke-Smith* at 509. ([top](#))

Moreover, the State of Hawaii is not "engaged in the business of making contracts of insurance" and thus does not meet the definition of insurer in section 431:1-202. Section 431:1-215 sets forth several actions which constitute the transaction of an insurance business and the State is not engaged in any of these activities.^{/2}

Therefore, we conclude that any third party liability coverage provided to the State is insurance, not reinsurance. Such insurance, and the company providing it to the State, must comply with all applicable requirements of the Insurance Code.

Very truly yours,

Deborah Day Emerson
Deputy Attorney General

APPROVED:

Margery S. Bronster
Attorney General

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^{/1} This opinion is limited to situations in which no captive insurance company is involved. ([back to document](#))

^{/2} We know of at least one instance in which the State is acting as an insurer. The legislature created the Hawaii Hurricane Relief Fund and, pursuant to section 431P-4(a), Hawaii Revised Statutes, authorized it to "offer policies of hurricane property insurance for sale" if it found that insurance was not reasonably available in the private market. The Fund also was directed in section 431P-7(c)(11), Hawaii Revised Statutes, to establish procedures for obtaining reinsurance. This specific statutory exception, however, does not alter the conclusion that in general the State is not an insurer and is not eligible to purchase reinsurance. ([back to document](#))
