



**STATE OF SOUTH DAKOTA  
OFFICE OF HEARING EXAMINERS**

**IN THE MATTER OF  
AMERICAN WHOLESALERS  
UNDERWRITING, LTD**

**PROPOSED ORDER  
INS 13-28**

An administrative hearing in the above matter was held on September 16, 2013. American Wholesalers Underwriting, Ltd. (hereinafter sometimes referred to as "American" or "Licensee") failed to appear. Frank Marnell appeared as counsel for the Division of Insurance (hereinafter sometimes referred to as "Division"). The matter was tape recorded. There is no written transcript of the tape; therefore, no citation to page number will be included. Exhibits 1 through 5 were admitted and will be denoted by EX followed by the appropriate number.

**ISSUE**

Whether the Non-Resident Business Entity Insurance Producer's License of American Wholesalers Underwriting, Ltd. should be revoked due to failure to respond in a timely manner to the inquiries of the South Dakota Division of Insurance dated March 14, 2013 and April 15, 2013 regarding the failure to report an administrative action within thirty days of the final disposition in Massachusetts. (SDCL 58-30-193, SDCL 58-33-66(1), and 58-30-167(2))

**FINDINGS OF FACT**

I.

American Wholesalers Underwriting, Ltd. possesses an active Non-Resident Business Entity Insurance Producer's License from the State of South Dakota. LFS became licensed in the State of South Dakota on May 8, 2009. (EX 1)

II.

Heather Lang, Compliance Agent for the South Dakota Division of Insurance obtained information that there had been an administrative action taken against American in Massachusetts and that this action had not been reported in a timely fashion.

III.

The Massachusetts administrative action alleges that American acted as an insurance producer from April 1, 2009 to May 15, 2009 without being licensed. A notice of the action was dated December 3, 2012. American agreed to cease and desist from the alleged actions as shown by

their representative's signature on page 2 of Exhibit 5. The signature is dated December 31, 2012. (EX 5)

IV.

Ms. Lang wrote a letter to American on March 14, 2013 inquiring why American had not reported the Massachusetts action to the Division. American was given 20 days from the receipt of the letter to respond. That letter was mailed to American at 1100 High Ridge Rd. Suite 203, Stamford, CT 06905-1201. (EX 2) This address is listed as the contact address on the Firm Information Inquiry kept by the Division. (EX 1) Ms. Lang received no response.

V.

Ms. Lang wrote American a second letter on April 15, 2013 wherein she informed them that they had failed to respond to the March 14, 2013 letter. American was informed of the ramifications of failing to respond. As was the March 2013 letter, this letter was mailed to American at 1100 High Ridge Rd. Suite 203, Stamford, CT 06905-1201. This letter was sent both first class and via Certified Mail-Return Receipt. American was given twenty days upon receipt to respond. (EX 3) Ms. Lang received no response.

VI.

The Department verified American's acceptance of the certified letter via the United States Postal Service's Track and Confirm site. The track and confirm site showed that the letter was delivered on April 18, 2013 at 1:10 pm. (EX 4)

VII.

No representative on behalf of American appeared at the hearing. The Division sent their Notice of Hearing on August 5, 2013 to the 1100 High Ridge Rd. address noted above plus four other addresses which are listed on the Certificate of Service.

VIII.

Any additional Findings of Fact included in the Reasoning section of this decision are incorporated herein by reference.

IX.

To the extent any of the foregoing are improperly designated and are, instead, Conclusions of Law, they are hereby redesignated and incorporated herein as Conclusions of Law.

## REASONING

This case involves a request by the Division of Insurance to revoke the South Dakota Non-Resident Business Entity Insurance Producer's License of American Wholesalers Underwriting, Ltd. As a consequence of the potential loss of Petitioner's livelihood from the lack of licensure, the burden of proof in this matter is higher than the preponderance of evidence standard, which applies in a typical administrative hearing. "In matters concerning the revocation of a professional license, we determine that the appropriate standard of proof to be utilized by an agency is clear and convincing evidence." *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989). Our Supreme Court has defined "clear and convincing evidence" as follows:

The measure of proof required by this designation falls somewhere between the rule in ordinary civil cases and the requirement of our criminal procedure, that is, it must be more than a mere preponderance but not beyond a reasonable doubt. It is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. The evidence need not be voluminous or undisputed to accomplish this.

*Brown v. Warner*, 78 S.D. 647, 653, 107 NW2d 1, 4 (1961). Licensee did not appear at the hearing.

SDCL 58-30-193 states that "[A]n insurance producer shall report to the director any administrative action taken against the insurance producer in another jurisdiction or by another governmental agency in this state within thirty days of the final disposition of the matter. This report shall include a copy of the order, consent order, or other relevant legal documents." Heather Lang, compliance agent for the South Dakota Division of Insurance found that American had not reported an administrative action from Massachusetts. In addition, American failed to respond in a timely fashion to the inquiries of the Division (letters dated March 12, 2012 and April 12, 2012) regarding the above administrative action in violation of SDCL 58-33-66(1).

Failing to respond to an inquiry from the Division of Insurance is considered an unfair or deceptive practice of the business of insurance as it is set forth in SDCL 58-33-66(1) in pertinent part:

**SDCL 58-33-66. Unfair or deceptive insurance practices.** Unfair or deceptive acts or practices in the business of insurance include the following:

- (1) Failing to respond to an inquiry from or failing to supply documents requested by the Division of Insurance within twenty days of receipt of such inquiry or request;...

The Division will consider SDCL 58-30-167 (shown in pertinent part) as follows:

**58-30-167. Causes for revocation, refusal to issue or renew license, or for monetary penalty-- Hearing--Notice.** The director may suspend for not more than twelve months, or may revoke or refuse to continue, any license issued under this chapter, or any license of a surplus lines broker after a hearing. Notice of such

hearing and of the charges against the licensee shall be given to the licensee and to the insurers represented by such licensee or to the appointing agent of a producer at least twenty days before the hearing. The director may suspend, revoke, or refuse to issue or renew an insurance producer's license or may accept a monetary penalty in accordance with § 58-4-28.1 or any combination thereof, for any one or more of the following causes:...

- (2) Violating any insurance laws or rules, subpoena, or order of the director or of another state's insurance director, commissioner, or superintendent;....

In deciding to revoke an insurance producer's license the Division looks to SDCL 58-33-68 for guidance as follows:

The Division of Insurance, in interpreting and enforcing §§ 58-33- 66 and 58-33-67, shall consider all pertinent facts and circumstances to determine the severity and appropriateness of action to be taken in regard to any violation of §§ 58-33-66 to 58-33-69, inclusive, including but not limited to, the following:

- (1) The magnitude of the harm to the claimant or insured;
  - (2) Any actions by the insured, claimant, or insurer that mitigate or exacerbate the impact of the violation;
  - (3) Actions of the claimant or insured which impeded the insurer in processing or settling the claim;
  - (4) Actions of the insurer which increase the detriment to the claimant or insured. The director need not show a general business practice in taking administrative action for these violations.
- However, no administrative action may be taken by the director for a violation of this section unless the insurer has been notified of the violation and refuses to take corrective action to remedy the situation.

Any administrative action taken by the director shall be pursuant to the provisions of chapter 1- 26.

Applying the law to the Findings of Fact it is clear that the South Dakota Non-Resident Business Entity Insurance Producer's License of American Wholesalers Underwriting, Ltd. should be revoked.

## **CONCLUSIONS OF LAW**

### I.

The Division of Insurance has jurisdiction over the parties and subject matter of this hearing pursuant to Title 58 of the South Dakota Codified Laws. The Office of Hearing Examiners is

authorized to conduct the hearing and issue a proposed decision pursuant to the provisions of SDCL 1-26D-4.

II.

The Division of Insurance bears the burden of establishing the alleged statutory violations by clear and convincing evidence.

III.

The Division of Insurance established by clear and convincing evidence that American Wholesalers Underwriting, Ltd. violated SDCL 58-30-193.

IV.

The Division of Insurance established by clear and convincing evidence that American Wholesalers Underwriting, Ltd. violated SDCL 58-33-66(1).

V.

The Division of Insurance established by clear and convincing evidence that the South Dakota Non-Resident Business Entity Insurance Producer's License of American Wholesalers Underwriting, Ltd. is subject to revocation.

VI.

The Division of Insurance established by clear and convincing evidence that the South Dakota Non-Resident Business Entity Insurance Producer's License of American Wholesalers Underwriting, Ltd. should be revoked.

VII.

Any additional Conclusions of Law included in the Reasoning section of this decision are incorporated herein by reference.

VIII.

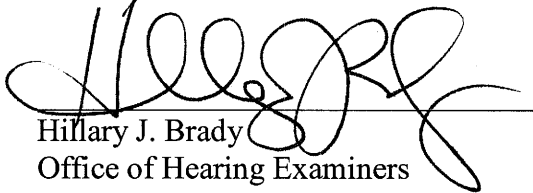
To the extent any of the foregoing are improperly designated and are instead Findings of Fact, they are hereby redesignated and incorporated herein as Findings of Fact.

Based on the above Findings of Fact, Reasoning and Conclusions of Law, the Hearing Examiner enters the following:

**PROPOSED DECISION**

The South Dakota Non-Resident Business Entity Insurance Producer's License of American Wholesalers Underwriting, Ltd. should be revoked.

Dated this 7<sup>th</sup> day of November 2013



Hillary J. Brady  
Office of Hearing Examiners  
523 E. Capitol  
Pierre, South Dakota 57501

**CERTIFICATE OF SERVICE**

I certify that on November 7, 2013, at Pierre, South Dakota, a true and correct copy of this Proposed Order was mailed to each of the parties listed below.



Ashley Couillard

ARCH INSURANCE COMPANY  
ATTN: PRODUCER LICENSING  
THREE PARKWAY, STE. 1500  
PHILADELPHIA, PA 19102

FRANK MARNELL  
ATTORNEY FOR THE DEPARTMENT  
445 E CAPITOL AVE  
PIERRE SD 57501

GREENWICH INSURANCE COMPANY  
ATTN: PRODUCER LICENSING  
505 EAGLEVIEW BLVD., STE. 100  
EXTON, PA 19341

XL INSURANCE AMERICA, INC.  
ATTN: PRODUCER LICENSING  
505 EAGLEVIEW BLVD., STE. 100  
EXTON, PA 19341

XL SPECIALTY INSURANCE COMPANY  
ATTN: PRODUCER LICENSING  
505 EAGLEVIEW BLVD., STE. 100  
EXTON, PA 19341