

**STATE OF LOUISIANA
DIVISION OF ADMINISTRATIVE LAW**

DEPARTMENT OF INSURANCE * **DOCKET NO. 2022-1574-INS**
 *
 *
IN THE MATTER OF *
 *
VELOCITY RISK UNDERWRITERS, * **DIRECTIVE 219**
LLC

DECISION AND ORDER

On January 24, 2022, the Louisiana Commissioner of Insurance, James J. Donelon (Commissioner) issued Directive 219 (Directive), requiring all authorized insurers and surplus lines insurers to comply with Louisiana Revised Statutes (La. R.S.) 22:1704(E)(2). The Directive also further ordered insurers to review all policy forms and endorsements to ensure compliance with La. R.S. 22:1704(E)(2).”

Velocity Risk Underwriters, LLC appealed the legal validity of the Directive. Based on the following, Directive 219 is not legally valid.

APPEARANCES

An administrative hearing was conducted at the Division of Administrative Law in Baton Rouge, Louisiana, on June 2, 2022, before Administrative Law Judge Cazeline G. Hebert. Mr. Olivier Carrier appeared as counsel on behalf of the Louisiana Department of Insurance (LDI). Mr. William D. Shea, counsel, and Mr. Rod Harden, Chief Claims Officer, appeared on behalf of Velocity Risk Underwriters, LLC (Appellant).

JURISDICTIONAL AUTHORITY

Jurisdiction is granted by La. R.S. 22:2191. This adjudication is conducted in accordance with the legislation governing the Division of Administrative Law, Chapter 13-B of Title 49, La. R.S. 49:991 *et seq.* These proceedings are governed by the Administrative Procedure Act, La.

R.S. 49:950 *et seq.*, and the Louisiana Insurance Code, 22:1 *et seq.*

STATEMENT OF THE CASE

On January 24, 2022, the Commissioner issued Directive 219, wherein he interpreted La. R.S. 22:1704(E)(2) to mean that insureds have the right to hire a public adjuster to help meet obligations under their insurance policy.

LDI alleged that the basis for issuing the Directive was because some insurers were attempting to prohibit the use of public adjusters in their policy provisions in direct contravention to La. R.S. 22:1704(E)(2). The Commissioner stated in the directive that the anti-public adjuster clauses attempt to prohibit insureds from hiring, engaging, retaining, or utilizing the services of a public adjuster. The Commissioner determined that the prohibitions against public adjusters in insurance contracts directly contradict La. R.S. 22:1704(E)(2).

On February 23, 2022, Appellant, a surplus lines insurer, timely filed a request for an administrative hearing with the Division of Administrative Law (DAL), seeking a declaration on the validity of Directive 219 because Appellant claimed it is aggrieved by the Directive.

The issue to be determined is whether Directive 219 is valid. Appellant argued Directive 219 is inconsistent with Louisiana law.

At the conclusion of the hearing, the record remained open until August 8, 2022, to allow the parties to submit post hearing memoranda. Both parties timely submitted memoranda, after which the undersigned closed the record and took the matter under advisement.

FINDINGS OF FACT

On January 24, 2022, the Commissioner of LDI issued Directive 219 to “all authorized insurers and surplus lines insurers (collectively insurers) doing business in Louisiana.” The Directive required insurers “to comply with La. R.S. 22:1704(E)(2).” The basis for LDI’s

issuance of the Directive was that some insurers were attempting to prohibit the use of public adjusters in their policy provisions. The Commissioner stated in the directive that the anti-public adjuster clauses attempt to prohibit insureds from hiring, engaging, retaining, or utilizing the services of public adjusters. The Commissioner determined that the public adjuster prohibition clauses in insurance contracts “directly contravene La. R.S. 22:1704(E)(2).” The Directive reads as follows.

All authorized insurers and surplus lines insurers (collectively insurers) doing business in Louisiana are hereby directed to comply with La. R.S. 22: 1704(E)(2), which grants insureds the right to hire a public adjuster to help meet obligations under their insurance policy. Insurers, as defined in La. R.S. 22 :46(10), include every person engaged in the business of making contracts of insurance. It has come to the attention of the Louisiana Department of Insurance that some insurers are attempting to prohibit the use of public adjusters by insureds in their policy provisions by endorsements to their policies. The anti-public adjuster clauses attempt to prohibit insureds from hiring, engaging, retaining, contracting with, or otherwise utilizing the services of a public adjuster. The prohibition contained in these endorsements or any other policy provision directly contravenes La. R.S. 22: 1704(E)(2), which grants insureds the right to hire a public adjuster. You are hereby directed to review all of your policy forms and endorsements to ensure compliance with La. R.S. 22: 1704(E)(2).

On February 23, 2022, Appellant filed its request for an administrative hearing as an aggrieved party to challenge the validity of Directive 219.

Appellant is a licensed producer and surplus lines broker in Louisiana, domiciled in Tennessee. Appellant focuses on bringing primarily coastal catastrophe capacity to non-admitted/surplus lines markets in Louisiana and throughout the United States, which includes writing commercial property insurance policies that contain anti-public adjuster endorsements.

CONCLUSIONS OF LAW

Directive 219 is not legally valid because it is based on an incorrect interpretation of Louisiana Revised Statutes. The Directive requires insurers to comply with La. R.S.

22:1704(E)(2), a statute that governs contracts between public adjusters and insureds. The Directive interprets La. R.S. 22:1704(E)(2) to provide a mandatory right to insureds to hire a public adjuster. The Directive ambiguously forbids insurers from using anti-public adjuster clauses in their insurance contracts.

To determine whether the Commissioner's action in issuing Directive 219 is invalid, Appellant has the burden to prove by a preponderance of the evidence that the Commissioner's action was arbitrary, capricious, or an abuse of discretion afforded to him by the Insurance Code.¹ An arbitrary act is an act based on random choice or personal whim, rather than any reason or system.² A conclusion of a public body is capricious when the conclusion has no substantial evidence to support it or the conclusion is contrary to substantial competent evidence.³ An abuse of discretion is an agency action that is clearly wrong, manifestly erroneous.⁴

DIRECTIVE 219 MISINTERPRETS La. R.S. 22:1704(E)(2)

Directive 219 cites La. R.S. 22:1704(E)(2) as the source of the Commissioner's authority to forbid insurers from prohibiting the use of public adjusters in insurance contracts. La. R.S. 22:1704(E)(2) is entitled "Contract between public adjuster and insured," and is contained within Part V of Chapter 5 of the Insurance Code entitled "Public Adjusters" which governs the qualifications and procedures for the licensing of public adjusters, and the duties of and restrictions for public adjusters.⁵ Part V of Chapter 5 of the Insurance Code does not apply to

¹ *Devillier v. State, Dept. of Pub. Safety & Corr., Pub. Safety Services, Office of State Police, Div. of Charitable Gaming Control, Gaming Enforcement Section*, 634 So. 2d 884 (La. App. 1st Cir., 1993); *Bowers v. Firefighters' Retirement System* 2008-1268 (La. 3/17/2009), 6 So. 3d 173, 176.

² *Reed v. State Farm Mut. Auto. Ins. Co.*, 2003-0107 (La. 10/21/03), 857 So. 2d 1012, 1020.

³ *Coliseum Square Ass'n v. City of New Orleans*, 544 So. 2d 351, 360 (La. 1989); *Sterling v. Dep't of Pub. Safety & Corr., Louisiana State Penitentiary*, 97-1960 (La. App. 1 Cir. 9/25/98), 723 So. 2d 448, 455.

⁴ *Jackson v. New Orleans Police Dep't*, 2005-0649 (La. App. 4 Cir. 3/29/06), 930 So. 2d 113, 116. random choice or personal whim.

⁵ La. R.S.22:1691, *et seq.*

insurers. Part V is directly related to contract requirements between a public adjuster and an insured.

La. R.S. 22:1704(E) specifically provides that “prior to the signing of the contract, the public adjuster shall provide the insured with a separate disclosure document regarding the claim process that states: (2) The insured is not required to hire a public adjuster to help the insured meet his obligations under the policy but has a right to do so.” LDI asserts that La. R. S. 22:1704(E)(2) creates a statutory right of an insured to hire a public adjuster. However, the statute only provides the requirements for a contract between a public adjuster and an insured. La. R. S. 22:1704(E)(2) does not set a state standard for the use of public adjusters in all insurance contracts.

For the sake of argument, if La. R.S. 22:1704(E)(2) was intended to give all insureds a general right to hire a public adjuster in all circumstances, there is no language in the statute that forbids the insured from waiving that right in an insurance contract in the hopes of obtaining a cheaper premium by abandoning the right to a public adjuster. The Commissioner does not have authority to create a stricter more absolute standard than the legislature used in La. R.S. 22:1704(E)(2), which simply states that the insured is not required to hire a public adjuster, but the insured has a right to do so. LDI did not cite any statute, promulgated rule or regulation that grants an insured an inalienable right to a public adjuster in an insurance contract.

LDI’s DEFENSE OF DIRECTIVE 219

LDI argued that “*La. R.S. 22:1704(E)(2) was not the statutory basis for Directive 219 but just a reaffirmation of the legislative intent to create a right with the enactment in Title 22 of Part V, Chapter 5, of the Insurance Code for the policyholder to hire a public adjuster.*”

More specifically, LDI asserted that “following the rules of code construction and seeking the legislative intent was the legal basis for issuing Directive 219.”

La. R.S. 22:46(6) defines a directive as “a written communication or order issued by or on behalf of the Commissioner of Insurance to a person whose activities are regulated by this Title, which instructs the person to act in conformance with this Title, or any rule or regulation adopted in accordance with the Administrative Procedure Act.” The definition of a directive does not indicate that a directive can be issued to mandate compliance with LDI’s policy concerns, rules of code construction or legislative intent. A directive can only be issued to enforce compliance with Title 22, or any rule or regulation adopted in accordance with the Administrative Procedure Act. There is no statute, promulgated rule or regulation that mandates an insured must hire a public adjuster.

Generally, La. R.S. 22:2(A)(1), is the primary enabling clause for the Commissioner’s authority under the Insurance Code. It sets forth that “[i]t shall be the duty of the commissioner of insurance to administer the provisions of this Code.” La. R.S. 22:2(E), sets forth that “[t]he commissioner of insurance shall have the authority to make reasonable rules and regulations, not inconsistent with law, to enforce, carry out, and make effective the implementation of this Code.” La. R.S. 22:11(A) authorizes the Commissioner to promulgate rules and regulations that he determines are necessary for implementation of the Insurance Code, provided that his establishment of each rule or regulation complies with legislative notice and other requirements set forth in La. R.S. 49:968.⁶

Directive 219 was issued without the formalities necessary for the establishment of a rule or regulation. A directive cannot be used to create mandatory prohibitions beyond statutory

⁶ La. R.S. 49:968 provides for the procedures whereby the legislature reviews the exercise of rule making authority of state agencies.

authority. LDI did not cite any other statute as its basis for Directive 219, nor did it list any other source of authority for the Directive. LDI's legal basis supporting Directive 219 is "clearly wrong." Therefore, Directive 219 is legally invalid.

ORDER

IT IS ORDERED that Directive 219 issued by the Louisiana Department of Insurance on January 24, 2022, is **INVALID**.

Rendered and signed on August 23, 2022, in Baton Rouge, Louisiana.

NOTICE OF TRANSMISSION OF DECISION OR ORDER

I certify that on Wednesday, August 24, 2022, I have sent a copy of this decision/order to all parties of this matter.



Cazeline G. Hebert
Administrative Law Judge
Division of Administrative Law

Clerk of Court
Division of Administrative Law

REVIEW RIGHTS

You may seek rehearing or reconsideration of this decision or order, subject to the grounds for and time limitations provided in Louisiana Revised Statutes 49:977.1. A request for rehearing must be sent to one of the addresses listed below.

EMAIL: INSprocessing@adminlaw.la.gov	MAIL: Division of Administrative Law ATTN: INS Processing P.O. Box 44033 Baton Rouge, LA 70804-4033
FAX: (225) 219-9820	
HAND DELIVERY TO: 1020 Florida Street, Baton Rouge, LA 70802	

You have the right to seek judicial review of this decision in accordance with Louisiana Revised Statutes 49:978.1. A petition for judicial review must be filed with the Nineteenth Judicial District Court within thirty (30) days after transmittal of notice of this decision.

