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JON BRUNING
ATTORNEY GENERAL

#06015

NO.
STATE OF NEBRASKA
OFFICIAL
NOV 21 2006
DEPT. OF JUSTICE

SUBJECT: "Notice of Risks" Requirement Contained in Neb. Rev. Stat. § 44-3522, as amended by 2006 Neb. Laws, LB 875.

REQUESTED BY: Senator Mick Mines
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General
Charles E. Lowe, Assistant Attorney General

BACKGROUND

In a letter to the Attorney General dated July 20, 2006, you expressed some concern about the constitutionality of an amendment to Neb. Rev. Stat. § 44-3522 made by the Legislature in 2006 Neb. Laws, LB 875. You referred to possible equal protection problems with a "Notice of Risks" requirement which is required by the amendment to be given to all potential purchasers of motor vehicle service contracts. You were particularly concerned about the requirement that, if the insurer of a motor vehicle service contract reimbursement insurance policy is not a Nebraska domesticated entity, a written warning be given stating: "The issuer of the motor vehicle service contract reimbursement insurance policy is not a domestic entity and the Department of Insurance can give no assurance that the issuer has adequate reserves to cover potential losses." You thought that this disparate treatment of non-domesticated insurers would likely run afoul of the equal protection clauses of the United States and Nebraska Constitutions.

In your letter of July 20, 2006, you indicated that you were considering introducing legislation to remove the notice of risks requirement from the law due to your "concerns

regarding its constitutionality." You specifically asked this office for its opinion "as to whether this [proposed legislation] would be a prudent change to the existing statute."

OPINION 06012

In response to your inquiry this office issued Op. Att'y Gen. No. 06012 (Aug. 28, 2006). In Opinion 06012 we discussed the legal standards for equal protection challenges to duly enacted laws and the arguments which could be made on both sides in the context of the notice of risks requirement. We concluded that it was not clear how a court would rule. We then proceeded to address your question about whether we thought your proposed elimination of the notice of risks requirement "would be a prudent change to the existing statute." We concluded that such elimination would be "prudent" in the sense that it would remove the equal protection issue altogether since the notice of risks requirement would no longer exist at all.

We went on in Opinion 06012 to suggest one other "prudent" possibility for statutory amendment that we thought would alleviate the equal protection concern without eliminating the notice of risks requirement completely. We noted that the notice of risks requirement could be amended to "make the notice regarding possible inadequate reserves equally applicable to all insurers, whether or not domiciled in Nebraska."

SUPPLEMENTAL REQUEST AND RESPONSE

You have now sent a letter to this office providing some additional information and confirming that there are no insurers domiciled in Nebraska who are currently offering motor vehicle service contract reimbursement insurance policies. You ask if this supplemental information would alter our earlier opinion in any sense.

Considering the information you provided, and upon further reflection, we would alter Opinion 06012 to note that merely amending the notice of risks requirement to "make the notice regarding possible inadequate reserves equally applicable to all insurers, whether or not domiciled in Nebraska" would not necessarily alleviate the equal protection issues raised by the notice of risks requirement in its present form. This is so because, since there are no Nebraska domiciled insurers offering motor vehicle service contract reimbursement insurance policies, an insurer not domiciled in Nebraska could argue that, while neutral on its face, the notice of risks requirement still unconstitutionally discriminates against insurers not domiciled in this state in its application. While we offer no opinion as to whether or not a court would agree with any such argument, we do conclude that our original alternative suggestion for amendment to the notice of risks requirement to alleviate equal protection concerns might not be as "prudent" as we had earlier thought and may not resolve the issue.

In all other particulars, we adhere to the opinions and views expressed in Opinion 06012.

Sincerely,

JON BRUNING
Attorney General

Charles E. Lowe
Assistant Attorney General

APPROVED:

Attorney General

17-036-24