



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 17, 1994

Honorable Curtis L. Seidlits, Jr.  
Chair  
Committee on State Affairs  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Letter Opinion No. 94-023

Re: Whether article I, section 16 of the Texas Constitution precludes the Texas Workers' Compensation Insurance Facility from denying workers' compensation insurance coverage to an employer that, prior to the effective date of section VII.f.6 of the facility's rules, committed the conduct that section VII.f.6 describes (ID# 23047)

Dear Representative Seidlits:

You have asked us about what you term "the retroactive application" of section VII of the Rules and Regulations Governing the Employers' Rejected Risk Fund, which Texas Workers' Compensation Insurance Facility (the "facility") has promulgated. Specifically, you inquire whether "the Texas Workers' Compensation Insurance Facility [may] deny an employer current insurance coverage by applying an administrative rule in a retroactive manner, particularly if the activity complained of affected the amount of premium owed under executed policies and not a current policy." We understand your concern to be whether the facility's application of the rule violates the prohibition in article I, section 16 of the Texas Constitution against retroactive laws, and we limit our opinion to that issue.

The legislature created the facility in 1989, *see* Acts 1989, 71st Leg., 2d C.S., ch. 1, § 13.11(a), at 1, 94, by the enactment of Insurance Code article 5.76-2. Article 5.76-2 became effective January 1, 1991, *see id.* § 17.18, at 122. Under section 2.01, Insurance Code article 5.76-2, the facility is a nonprofit unincorporated association of insurance companies and other entities authorized to write workers' compensation insurance policies in this state. *See* Ins. Code art. 5.76-2, § 1.01(11) (defining "insurer"). One of the facility's purposes is to provide, through the employers' rejected risk fund, workers' compensation insurance coverage for employers that are in good faith entitled to such coverage but that are unable to procure or retain it through ordinary methods in the voluntary market. *Id.* § 2.02(2); *see id.* §§ 1.01(8) (defining "good faith"), (14) (defining "rejected risk"); 4.01 (articulating purpose of rejected risk fund). Section 2.11 of article 5.76-2 stipulates that the facility is a governmental body only for purposes of the Open Records Act, Government Code chapter 552, and the Open Meetings Act, Government Code chapter 551. Section 2.04(a) of article 5.76-2 authorizes the facility, subject to the approval of the Texas Department of Insurance (the "department"), to "adopt, amend, and

repeal bylaws, rules, and regulations necessary to implement this article." *See id.* § 2.04(b) (describing procedure to which facility must adhere to adopt, amend, and repeal bylaws, rules, and regulations). Section 2.04(c) provides the department with continuing jurisdiction over all of the facility's bylaws, rules, and regulations.

Prior to the creation of the facility, the Texas Workers' Compensation Assigned Risk Pool, an entity composed of insurance companies and associations authorized to write workers' compensation or longshoremen's and harbor workers' compensation insurance in this state, provided workers' compensation insurance coverage to rejected risk employers that were in good faith entitled to it. *See* Ins. Code art. 5.76(a), (b), (c), (d), *repealed by* Acts 1989, 71st Leg., 2d C.S., ch. 1, § 16.01, at 1, 115. The legislature enacted article 5.76 of the Insurance Code, which created the pool, in 1953. *See* Acts 1953, 53d Leg., ch. 279, § 1, at 716.

Pursuant to the authority section 2.04(a) provides it, the facility has, presumably with the approval of the department, promulgated its Rules and Regulations Governing the Employers' Rejected Risk Fund (the "rules"). Section VII of the rules provides for an employer that is a rejected risk to apply to the facility for workers' compensation insurance coverage. Section VII.a requires the facility, upon an employer's application to the facility "through a producer of record duly licensed," to provide workers' compensation insurance coverage to "any risk that is in good faith entitled to insurance under the Texas Workers' Compensation Act," Labor Code title 5, subtitle A, and the rules and that, within sixty days preceding the date of application to the facility, "at least two nonaffiliated private insurance companies licensed to write workers' compensation insurance within" this state have rejected for coverage. Section VII.f.6 provides in pertinent part as follows:

f. An entity is not in good faith<sup>1</sup> entitled to insurance if any of the following circumstances exist, at the time of application or thereafter. . . . :

. . . .

6. If the entity aids any person in evading, escaping or avoiding in any manner that person's experience modifier,<sup>2</sup> including but not limited to the following: entering into any agreement or arrangement which attempts either to affect or define the employee/employer relationship or to assign duties and

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<sup>1</sup>Section I.g of the Rules and Regulations Governing the Employers' Rejected Risk Fund define "good faith" as "honesty in fact in any conduct or transaction." *See also* V.T.C.S. art. 5.76-2, § 1.01(8) (defining "good faith").

<sup>2</sup>You explain that the facility uses an employer's experience modifier, a number that indicates experience with employee injuries in the workplace, to compute premiums for workers' compensation insurance coverage.

responsibilities associated with employment among the parties to the agreement or arrangement but which allows workers to engage in the furtherance of the person's work, business, trade or profession when that agreement or arrangement results in a lower experience modifier than would be otherwise applicable to the person without the agreement or arrangement. Information regarding any such agreement or arrangement is "information pertinent to the insuring or servicing of the policyholder or applicant" and failure to fully disclose such information will also result in termination of the insurance of the policyholder or rejection of the application.<sup>3</sup>

Further, if any entity has entered into any agreement or arrangement as described above prior to its application as a Rejected Risk and has thereby evaded, escaped or avoided its experience modifier, then that applicant is not considered to be in good faith for purposes of applying for or obtaining a workers' compensation insurance policy. Any workers' compensation insurance policy covering such an entity in that period is subject to cancellation.

Provided, however, an applicant or an insured may avoid rejection or cancellation, as applicable, if it cures the lack of good faith caused by its actions as described in this paragraph 6 by correcting the effects of its actions, either by paying the proper premium which would have been paid if the proper experience modifier had been used, by taking other appropriate action required by the Facility, or both. [Footnotes added.]

A representative of the facility has informed us that the facility promulgated this rule in response to situations involving certain employers with a high experience modifier, *i.e.*, a higher than average number of workers' compensation claims resulting in high workers' compensation insurance premiums. To lower its premium, such an employer would fire all of its employees and, by prearrangement, an employee leasing service (often affiliated with the employer) with a low experience modifier would hire the employees; subsequently, the former employer would lease the employees back through the employee leasing service. The employer then would take advantage of a lower workers' compensation insurance premium.

You believe that subsection f.6 of section VII became effective October 14, 1992; for purposes of this letter, we will assume that you are correct. You state, however, that

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<sup>3</sup>Section 4.06(b) of Insurance Code article 5.76-2 authorizes the facility to consider, as sufficient grounds to cancel a policy or deny an application for insurance, a policyholder's or applicant's failure or refusal to comply "with any rule prescribed by the facility for the prevention of injuries or failure or refusal to make full disclosure of all *information pertinent to the insuring or servicing of the policyholder or applicant.*" (Emphasis added.)

the facility recently has invoked the subsection to deny workers' compensation insurance coverage to several employers on the ground that the employers were parties to employee leasing arrangements during portions of 1990 and 1991 that affected the amount of premium the employers paid to the facility during 1990 and 1991 to insure leased employees. Thus, you point out, the employee leasing activity to which the facility objects occurred prior to the October 14, 1992, effective date of subsection f.6. You question the propriety of this "retroactive," as you refer to it, application of subsection f.6.

Article I, section 16 of the Texas Constitution prohibits the enactment of any retroactive law. *See generally* 1 D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 58-62 (1977); 12 TEX. JUR. 3d *Constitutional Law* §§ 237-244 (1993). As this prohibition has been construed, it precludes the enactment of a law that deprives or impairs vested substantive rights acquired under existing law or that creates new obligations, imposes new duties, or adopts new disabilities in respect to past transactions. 12 TEX. JUR. 3d, *supra*, § 238, at 697. In general, a statute will be construed to operate prospectively unless the legislature clearly has indicated a contrary intent. Attorney General Opinions M-983 (1971) at 2 (citing 53 TEX. JUR. 2d *Statutes* § 28, at 51); V-1354 (1951) at 2 (citing *Freeman v. Terrell*, 284 S.W. 946 (1926)); *see also* Tex. Const. art. I, § 16; Attorney General Opinions WW-847 (1960) at 1-2 (quoting *State v. Humble Oil & Ref. Co.*, 169 S.W.2d 707 (1943)); WW-518 (1958) at 3 (quoting 39 TEX. JUR. 54). A statute does not operate retroactively merely because it relates to antecedent events. 73 AM. JUR. 2d *Statutes* § 348, at 486 (1974). Furthermore, a statute does not operate retroactively unless vested rights acquired under an existing law are taken away or impaired. *See International Sec. Life Ins. Co. v. Maas*, 458 S.W.2d 484, 490 (Tex. Civ. App.--Houston [1st Dist.] 1970, writ *ref'd n.r.e.*) (citing *McCain v. Yost*, 284 S.W.2d 898 (1955)).

Of course, the constitutional prohibition does not apply to a rule that a private nonprofit corporation has enacted. Pursuant to article 5.76-2 of the Insurance Code, sections 2.01, 2.11, the facility is a nonprofit unincorporated association of insurance companies that operates as a governmental body only for purposes of the Open Records and Open Meetings Acts. However, because the department has the power to approve and continuing jurisdiction over the facility's rules, we believe that the rulemaking authority ultimately inheres in the department, not the facility. *See* Attorney General Opinion DM-135 (1992) at 4. Indeed, any other reading of article 5.76-2 arguably would render it unconstitutional to the extent that it delegates rulemaking authority to a private entity. *See id.* Thus, the rules of the facility are in actuality, rules of the department subject to the constitutional prohibition against retroactive laws.

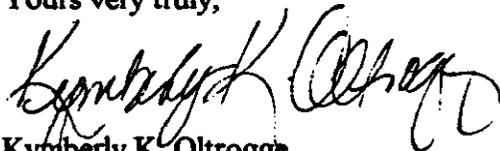
Thus, unless the rule takes away or impairs a vested right that the employer had acquired under an existing law, the rule does not operate retroactively. *See International Sec. Life Ins. Co.*, 458 S.W.2d at 490. An employer never has had a vested right to purchase workers' compensation insurance through the facility or the facility's predecessor,

the pool. Consequently, we believe that the facility may, without violating the constitutional prohibition against retroactive laws, deny workers' compensation insurance coverage to an employer that, prior to the effective date of section VII.f.6 of the facility's rules, had committed the conduct that section VII.f.6 describes.

**S U M M A R Y**

Article I, section 16 of the Texas Constitution precludes the enactment of a law that deprives or impairs vested substantive rights acquired under existing law. An employer never has had a vested right to purchase workers' compensation insurance through the Workers' Compensation Insurance Facility or the facility's predecessor, the Workers' Compensation Assigned Risk Pool. Consequently, the facility may, without violating article I, section 16 of the constitution, deny workers' compensation insurance coverage to an employer that, prior to the effective date of section VII.f.6 of the facility's rules, had committed the conduct that section VII.f.6 describes.

Yours very truly,



Kimberly K. Oltrogge  
Assistant Attorney General  
Opinion Committee