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COMMISSION OF INSURANCE
INSURANCE DIVISION OF IOWA

BEFORE THE INSURANCE DIVISION OF THE STATE OF IOWA

Petition by Forethought Life Insurance Company for a Declaratory Order on Iowa Code Chapter 523A

(Iowa Code §§ 523A.102(26), 523A.303, 523A.401)

**PETITION FOR
DECLARATORY ORDER**

Petitioner Forethought Life Insurance Company (“Forethought”), by and through its attorneys, Faegre Baker Daniels LLP, prays that the Iowa Insurance Division issue a declaratory order regarding the proper interpretation and meaning of Iowa Code §§ 523A.102(26), 523A.303, and 523A.401 and whether those statutory provisions impose notice and remittance obligations on preneed insurers, stating:

JURISDICTION

1. This declaratory action concerns the proper interpretation and meaning of Iowa Code §§ 523A.102(26), 523A.303 and 523A.401. As Chapter 523A is within the primary jurisdiction of the Insurance Division, this Petition for Declaratory Order is proper. Iowa Admin. Code 191-2.1(1) (17A).

QUESTIONS PRESENTED

2. The following four questions are presented for determination of the Iowa Insurance Commissioner:

- a. Are preneed insurers “sellers” within the meaning of Iowa Code Chapter 523A (as defined in Iowa Code § 523A.102(26))?

- b. Are preneed insurers subject to the notice and remittance requirements in Iowa Code § 523A.303?
- c. Do Iowa Code §§ 523A.303(1)(b) and 523A.303(2)(d)(4) pertain to excess funds from the proceeds of a preneed insurance policy or do they apply only to “burial trusts”?
- d. Does Iowa Code § 523A.401(5) require Forethought and other preneed insurers to disburse to sellers only that portion of preneed policy proceeds that is necessary to pay for the cemetery and funeral merchandise and services provided by the seller pursuant to the purchase agreement?

STATUTORY PROVISIONS AT ISSUE

3. The three statutory provisions at issue in this declaratory action are set forth below in compliance with Section 191-2.1(2)(b) of the Iowa Administrative Code.

4. Iowa Code § 523A.102(26) defines “seller” as follows:

523A.102 Definitions.

26. “*Seller*” or “*preneed seller*” means a person doing business within this state, including a person doing business within this state who sells insurance, who advertises, sells, promotes, or offers to furnish cemetery merchandise, funeral merchandise, funeral services, or a combination thereof when performance or delivery may be more than one hundred twenty days following the initial payment on the account whether the transaction is completed or offered in person, through the mail, over the telephone, by the internet, or through any other means of commerce. “*Seller*” or “*preneed seller*” includes any person performing any term of a purchase agreement executed within this state, and any person identified under a burial account as the provider of cemetery merchandise, funeral merchandise, funeral services, or a combination thereof. “*Seller*” or “*preneed seller*” does not include a person who has an ownership interest in a seller or preneed seller but who is not activity engaged in advertising, selling, promoting, or offering to furnish such cemetery merchandise, funeral merchandise, funeral services, or a combination thereof.

5. Iowa Code § 523A.303 provides:

523A.303 Disbursement of remaining funds.

1. If funds remain in a nonguaranteed irrevocable burial trust fund or from the proceeds of an insurance policy or annuity made payable or assigned to the seller or a provider after the payment of funeral and burial expenses in accordance with the conditions and terms of the purchase agreement for cemetery merchandise, funeral merchandise, or funeral services, the seller shall comply with all of the following:
 - a. The seller shall provide written notice by mail to the director under subsection 2.
 - b. At least sixty days after mailing notice to the director, the seller shall disburse any remaining funds from the burial trust fund as follows:
 - (1) If within the sixty-day period the seller receives a claim from the personal representative of the deceased, any remaining funds shall be disbursed to the personal representative, notwithstanding any claim by the director.
 - (2) If within the sixty-day period the seller has not received a claim from the personal representative of the deceased but receives a claim from the director, the seller shall disburse the remaining funds up to the amount of the claim to the director.
 - (3) Any remaining funds not disposed of pursuant to subparagraphs (1) and (2) shall be disbursed to any person who is identified as the next of kin of the deceased in an affidavit submitted in accordance with subsection 5.
2. The notice mailed to the director shall meet all of the following requirements and is subject to all of the following conditions:
 - a. The notice shall be mailed with postage prepaid.
 - b. If the notice is sent by regular mail, the sixty-day period for receipt of a response is deemed to commence three days following the date of mailing.
 - c. If the notice is sent by certified mail, the sixty-day period for receipt of a response is deemed to commence on the date of mailing.
 - d. The notice shall provide all of the following information:
 - (1) Current name, address, and telephone number of the seller.
 - (2) Full name of the deceased.
 - (3) Date of the deceased's death.
 - (4) Amount of funds remaining in the burial trust fund.
 - (5) Statement that any claim by the director must be received by the seller within sixty days after the date of mailing of the notice.

e.

A notice in substantially the following form complies with this subsection:

TO: THE DIRECTOR OF HUMAN SERVICES

FROM: (SELLER'S NAME, CURRENT ADDRESS, AND TELEPHONE NUMBER)

You are hereby notified that (name of deceased), who had an irrevocable burial trust fund, has died, that final payment for cemetery merchandise, funeral merchandise, and funeral services has been made, and that (remaining amount) remains in the irrevocable burial trust fund.

The above-named seller must receive a written response regarding any claim by the director within sixty days after the mailing of this notice to the director.

If the above-named seller does not receive a written response regarding a claim by the director within sixty days after the mailing of this notice, the seller may dispose of the remaining funds in accordance with section 523A.303, Code of Iowa.

3. Upon receipt of the seller's written notice, the director shall determine if a debt is due the department of human services pursuant to section 249A.53. If the director determines that a debt is owing, the director shall provide a written response to the seller within sixty days after the mailing of the seller's notice. If the director does not respond with a claim within the sixty-day period, any claim made by the director shall not be enforceable against the seller, the trust, or a trustee.
4. A personal representative who wishes to make a claim shall send written notice of the claim to the seller. If the seller does not receive any claim from a personal representative within the sixty-day period provided for response by the director regarding a claim, the claim of the personal representative shall not be enforceable against the seller, the trust, or a trustee.
5. Any person other than a personal representative or the director claiming an interest in the remaining funds shall submit an affidavit claiming an interest which provides the following information:
 - a. Full name, current address, and telephone number of the claimant.
 - b. Claimant's relationship to the deceased.
 - c. Name of any surviving next of kin of the deceased, and the relationship of any named surviving next of kin.
 - d. That the claimant has no knowledge of the existence of a personal representative for the deceased's estate.

6. The seller may retain not more than fifty dollars of the remaining funds in the burial trust fund for the administrative expenses associated with the requirements of this section.
7. If the funds remaining in a burial trust fund are disbursed under the requirements of this section, the seller, the provider, the burial trust fund, and any trustee shall not be liable to the director, the estate of the deceased, any personal representative, or any other interested person for the remaining funds and any lien imposed by the director shall be unenforceable against the seller, the burial trust fund, or any trustee.

6. Iowa Code § 523A.401 provides:

523A.401 Purchase agreements funded by insurance proceeds.

1. A purchase agreement may be funded by insurance proceeds derived from a new or existing insurance policy issued by an insurance company authorized to do business and doing business within this state.
2. Such funding may be in lieu of the trusting requirements of this chapter when the purchaser assigns the proceeds of an existing insurance policy.
3. Such funding may be in lieu of the trusting requirements of this chapter when a new insurance policy is purchased to fund the purchase agreement, with a face amount equal to or greater than the current retail price of the cemetery merchandise, funeral merchandise, and funeral services to be delivered under the purchase agreement or, if less, a face amount equal to the total of all payments to be submitted by the purchaser pursuant to the purchase agreement.
4. The premiums of any new insurance policy shall be fully paid within thirty days after execution of the purchase agreement or, with respect to a purchase agreement that provides for periodic payments, the premiums shall be paid directly by the purchaser to the insurance company issuing the policy.
5. Any new insurance policy shall satisfy the following conditions:
 - a. Except as necessary and appropriate to satisfy the requirements regarding burial trust funds under Tit. XIX of the federal Social Security Act, the policy shall not be owned by the seller, the policy shall not be irrevocably assigned to the seller, and the assignment of proceeds from the insurance policy to the seller shall be limited to the seller's interests as they appear in the purchase agreement, and conditioned on the seller's delivery of cemetery merchandise, funeral merchandise, and funeral services pursuant to a purchase agreement.
 - b. The policy shall provide that any assignment of benefits is contingent upon the seller's delivery of cemetery merchandise,

funeral merchandise, and funeral services pursuant to a purchase agreement.

- c. The policy shall have an increasing death benefit or similar feature that provides some means for increasing the funding as the cost of cemetery merchandise, funeral merchandise, and funeral services increases.
6. With the written consent of the purchaser, an existing prepaid purchase agreement with trust-funded benefits may be converted to a prepaid purchase agreement with insurance-funded benefits provided the seller and the insurance benefits comply with the following provisions:
 - a. The transfer of the trust funds to the insurance company must be at least equal to the full sum required to be deposited as trust principal under the trust-funded prepaid purchase agreement plus all net earnings accumulated with respect thereto, as of the transfer date. Commissions, allowances, surrender charges or other forms of compensation or expense loads, premium expense, administrative charges or expenses, or policy fees shall not be deducted from the trust funds transferred pursuant to the conversion.
 - b. The face amount of any insurance policy issued on an individual must be no less than the amount of principal and interest transferred for that individual to the insurance company, and any supplemental insurance policy issued to cover the unfunded portion of the purchase agreement must have a face amount that is at least as great as the unfunded principal balance. The face amount of the insurance purchased shall not, under any circumstances, be less than the total of all payments made by the purchaser pursuant to the agreement plus all net earnings accumulated with respect thereto, as of the transfer date.
 - c. The insurance policy shall not be contestable, or limit death benefits in the case of suicide, with respect to that portion of the face amount of the policy that is required by paragraph "b". The policy shall not refer to physical examination, or otherwise operate as an exclusion, limitation, or condition other than requiring submission of proof of death or surrender of policy at the time the prepaid purchase agreement is funded, matures, or is canceled, as the case may be.
 - d. The seller shall maintain a copy of any prepaid trust-funded purchase agreement that was converted to a prepaid insurance-funded purchase agreement and retain the payment history records for each converted purchase agreement prior to conversion until the cemetery merchandise, funeral merchandise, and funeral services have been delivered.
7. The seller of a purchase agreement subject to this chapter which is to be funded by insurance proceeds shall obtain all licenses required to be obtained and comply with all reporting requirements under this chapter. A

parent company, provider, or seller shall not pledge, borrow from, or otherwise encumber an insurance policy funding a purchase agreement.

8. An insurance company issuing policies funding purchase agreements subject to this chapter shall file an annual report with the commissioner on a form prescribed by the commissioner. The report shall list the applicable insurance policies outstanding for each seller.
9. The commissioner, by rule, may require written trust agreements and establish conditions for trusts holding insurance policies or maintaining ownership rights under insurance policies. The seller or any officer, director, agent, employee, or affiliate of the seller shall not serve as a trustee. The commissioner may require amendments to a trust agreement that is not in accord with the provisions of this chapter or rules adopted under this chapter.
10. All records maintained by the commissioner under this section shall be confidential pursuant to *section 22.7*, subsection 58, and shall not be made available for inspection or copying except upon approval of the commissioner or the attorney general, or except when sought by the insurance company to whom the records relate. Such records shall be privileged and confidential in any judicial or administrative proceeding except any of the following:
 - a. An action commenced by the commissioner.
 - b. An administrative proceeding brought by the insurance division.
 - c. An action or proceeding which arises out of the criminal provisions of the laws of this state or of the United States.
 - d. An action brought by the insurance division or the attorney general to recover moneys for embezzlement, misappropriation, or misuse of trust funds.

RELEVANT FACTS AND BACKGROUND

7. In compliance with Sections 191-2.1(2)(a), (e), and (f) of the Iowa Administrative Code, Forethought sets forth the relevant facts and background.

8. This declaratory action concerns preneed insurance policies.

9. Forethought is an insurance company that sells preneed insurance policies in Iowa.

10. A preneed insurance policy is a policy designed to cover the costs of funeral and cemetery expenses. When an individual takes out a preneed insurance policy, that policy is immediately assigned to a funeral home that agrees to provide certain funeral and cemetery

services upon the insured's death. After those funeral and cemetery services are paid, however, excess insurance policy proceeds sometimes remain.

11. Under Iowa law, medical services provided to a Medicaid recipient create a debt on the recipient's estate at death. Iowa Code § 249A.53(2).

12. The Iowa Department of Human Services ("IDHS") recovers Medicaid payments from the estates of Medicaid recipients in Iowa.

13. In 2001, Iowa enacted the Iowa Cemetery and Funeral Merchandise and Funeral Services Act, Iowa Code Chapter 523A (the "Act"). Among other things, the Act imposes notice and remittance requirements on "sellers" when excess proceeds of a preneed policy remain after funeral expenses are paid. Iowa Code § 523A.303. Specifically, "sellers" are required in those circumstances to (a) provide written notice to IDHS in accordance with Iowa Code §§ 523A.303(1)(a) and 523A.303(2) and (b) to comply with the remittance requirements of Iowa Code § 523A.303(1)(b).

14. These obligations apply only to "sellers." As such, they do not apply to Forethought and other preneed insurers because the definition of "seller" does not include insurers. Rather a "seller" under the Act is limited to those who provide cemetery and funeral merchandise and services. Iowa Code § 523A.102(26).

15. Forethought is a life insurance company. Forethought is not a funeral home. The company does not advertise, sell, promote, or offer to furnish cemetery merchandise, funeral merchandise, or funeral services. As such, Forethought and other preneed insurers are not "sellers" under the Act and, accordingly, are not subject to the notice and remittance requirements of Section 523A.303.

16. For at least the last decade, IDHS has intermittently reached out to Forethought and the other preneed insurers in Iowa suggesting that these companies must comply with the notice and remittance requirements of Section 523A.303, and demanding the companies turn excess proceeds over to the State. In response, Forethought and other preneed insurers have explained to IDHS that the statute imposes no obligations on them, but rather, just as with any other insurance policy, they are bound by their contractual obligation to pay excess proceeds to the beneficiary designated under the policy.

17. In short, Forethought and other Iowa preneed insurers face a catch-22 situation. On the one hand, IDHS continuously threatens to sue Forethought if it refuses to subject itself to the notice and remittance requirements imposed on “sellers” under Section 523A.303; on the other hand, if Forethought acquiesces to IDHS’ interpretation, Forethought risks lawsuits from policy beneficiaries on the ground that the Act does not actually impose any such requirements on an insurer, and thus the failure to turn over excess proceeds to the beneficiaries is a breach of contract.

18. In an attempt to resolve this ongoing dispute, in 2013, the preneed insurers supported legislation that would have required Medicaid recipients to designate IDHS as the primary beneficiary of any excess proceeds of a preneed policy. The Iowa Legislature ultimately did not pass the proposed legislation. Since the legislative efforts of 2013, IDHS has again intermittently tried to pressure preneed insurers into complying with the notice and remittance provisions of Section 523A.303. However, until recently, IDHS has not actually brought suit against any of the preneed insurers.

19. On or about October 2, 2017, IDHS filed a Petition for Declaratory Judgement against Forethought in Iowa District Court, Polk County. The case is entitled *Iowa Dep’t of*

Human Servs. v. Cataldo and Global Atlantic Fin'l Co. dba Forethought, Case No. 05771 CVCV055022 (the “District Court Action”). Therein, IDHS seeks a declaratory judgment regarding the proper interpretation of the Act and seeks to recover from Forethought damages for past non-compliance with the notice and remittance requirements that the Act imposes on “sellers.”

20. The individual defendant, Joseph Cataldo, has been dismissed from the suit,¹ and cross motions for summary judgment filed by IDHS and Forethought are currently pending before the District Court. Hearing on the motions for summary judgment is scheduled for Friday, April 20, 2018. The motions require the District Court to interpret the provisions of the Act that are the subject of this Declaratory Petition. IDHS contends that Forethought is subject to the notice and remittance requirements in Section 523A.303. IDHS is now also arguing in the District Court Action that Section 523A.401(5)(a) requires Forethought to disburse excess funds to “sellers.” However, to the contrary, that provision actually prohibits disbursement of excess proceeds to the “sellers.”

21. As such, through the District Court Action, IDHS seeks a declaratory ruling that will effectively require Forethought to disobey its obligation to pay excess proceeds from preneed policies to the designated beneficiaries. IDHS also seeks to recover damages for Forethought’s past actions in not complying with the notice and remittance obligations imposed by the Act on “sellers.”

¹ Cataldo was named in the District Court Action because he received excess funds as the beneficiary of a preneed policy on a Medicaid beneficiary. IDHS dismissed Cataldo from the suit after he paid IDHS the funds at issue. Of course, IDHS can always recover the excess funds from the beneficiaries themselves, as it did in this case with Mr. Cataldo. IDHS’ belief that insurers should be subject to the notice and remittance requirements of the Act because it would make recovery easier for IDHS cannot change the words of the Act itself, which simply do not impose those requirements on insurers.

22. As Forethought has, and continues to be, locked in a catch-22 situation in which it is forced to choose between complying on one hand with the obligation to pay excess funds to contract beneficiaries or complying on the other hand with the IDHS' interpretation of the Act (or else risk liability as sought by IDHS in the District Court Action), Forethought needs guidance from the Insurance Division as to the proper interpretation of the Act.

23. Through the District Court Action, and IDHS' attempt to recover substantial monies therein for Forethought's past actions relative to the Act, IDHS essentially seeks to construct an enforcement scheme that is not provided by the Act. Rather, the Act gives the Insurance Division the authority to enforce the Act, not IDHS. Iowa Code § 523A.801(1) ("This chapter shall be administered by the commissioner.").

24. As stated by the Iowa Supreme Court in *City of Des Moines v. Des Moines Police Bargaining Unit Ass'n.*, "it is appropriate for the agency in the first instance to interpret the statutes it administers. Even if the dispute is not resolved before the agency, the court upon subsequent review will have the benefit of the agency's insight into the problem." 360 N.W.2d 729, 732 (Iowa 1985).

25. As such, Forethought is simultaneously filing in the District Court Action a motion requesting that the case be stayed and/or dismissed.

26. Forethought has repeatedly asked IDHS to seek this declaratory order, but IDHS has refused. Given IDHS' refusal and its actions in the pending District Court Action, Forethought has no choice but to file this Declaratory Petition and seek the declaratory order set forth herein.

27. In compliance with Section 191-2.1(2)(f) of the Iowa Administrative Code, other than the District Court Action discussed above, Forethought states that it is not aware that the

questions set forth herein “have been decided by, are pending determination by, or are under investigation by, any governmental entity.”

ANSWERS TO QUESTIONS PRESENTED

A. Question No. 1: Insurers are Not “Sellers” Within the Meaning of Iowa Code Chapter 523A

28. Section 523A.102(26) of the Act defines “sellers.”

29. That definition requires that for a person to be a “seller,” the person must be one “who advertises, sells, promotes or offers to furnish cemetery merchandise, funeral merchandise, funeral services, or a combination thereof.” As preneed insurers do not provide cemetery or funeral merchandise or services, they are not “sellers” under the Act.

30. The phrase “including a person doing business within this state who sells insurance” that appears in the definition of “seller” is not an independent, additional category of persons falling within the definition of “seller,” but rather is a clarification that persons who sell and furnish cemetery or funeral merchandise or services constitute “sellers” under the statute even if they also sell insurance.

31. The Act clearly distinguishes throughout between “sellers” and insurance companies. For example, while “sellers” are required to file annual reports under Section 523A.204, the legislature found it necessary and proper to require insurance companies to file separate annual reports pursuant to Section 523A.401(8).

B. Question No. 2: Insurers are Not Subject to the Notice and Remittance Requirements of Section 523A.303

32. The notice and remittance requirements in Section 523A.303 are imposed only on “sellers.” Iowa Code § 523A.303(1) (stating “the seller shall comply with all of the following . . .”); § 523A.303(1)(a) (stating “seller shall provide written notice by mail to the director under

subsection 2”); § 523A.303(1)(b) (stating “seller shall disburse any remaining funds from the burial trust fund as follows . . .”).

33. As preneed insurers do not constitute “sellers” within the Act, they are not subject to the requirements of Section 523A.303.

C. Question No. 3: Sections 523A.303(1)(b) and 523A.303(2)(d)(4) Pertain Only to Burial Trusts, and Thus Do Not Apply to Excess Funds From the Proceeds of a Preneed Insurance Policy

34. Subparagraph 1 of Section 523A.303 addresses remaining funds from (a) “a nonguaranteed irrevocable burial trust fund” and (b) “an insurance policy or annuity made payable or assigned to the seller or a provider.”

35. However, the actual remittance requirement in subsection (1)(b) expressly applies only to excess funds from a “burial trust fund.” Iowa Code § 523A.303(1)(b).

36. Likewise, the notice requirements set forth in subsection (2) state that the seller must notify IDHS of the “[a]mount of funds remaining in the burial trust fund.” Iowa Code § 523A.303(2)(d)(4). Nothing in the notice requirements impose a similar requirement for excess funds from a preneed insurance policy.

37. As such, the notice and remittance requirements in Section 523A.303 of the Act apply only to excess funds from burial trusts and do not apply to remaining funds from the proceeds of a preneed insurance policy.

D. Section 523A.401(5) Requires Forethought and Other Preneed Insurers to Disburse to Sellers Only that Portion of Preneed Policy Proceeds that is Necessary to Pay for the Cemetery and Funeral Merchandise and Services Provided by the Seller Pursuant to the Purchase Agreement

38. Section 523A.401 of the Act addresses preneed insurance policies as alternatives to burial trusts. *See* Iowa Code § 523A.401(1)-(3).

39. IDHS alleges in the District Court Action that Section 523A.401(5)(a) requires Forethought and other preneed insurers to submit excess funds to the seller rather than pay those funds to the designated beneficiaries. However, to the contrary, that section actually prohibits preneed insurers from doing so by requiring that the proceeds assigned to the seller be limited to only that amount needed to pay for the funeral and cemetery services and merchandise.

40. In that regard, subsection (5)(a) states that “the assignment of proceeds from the insurance policy to the seller shall be limited to the seller’s interests as they appear in the purchase agreement, and conditioned on the seller’s delivery of cemetery merchandise, funeral merchandise, and funeral services pursuant to a purchase agreement.” Iowa Code § 523A.401(5)(a). Moreover, subsection (5)(b) states that the “policy shall provide that any assignment of benefits is contingent upon the seller’s delivery of cemetery merchandise, funeral merchandise, and funeral services pursuant to a purchase agreement.” Iowa Code § 523A.401(5)(b).

41. As such, Section 523A.401(5) requires preneed insurers to pay to sellers only that portion of the proceeds that is necessary to pay for the cemetery and funeral merchandise and services.

42. IDHS' argument in the District Court Action appears to be that subsection (5)(a)'s introductory phrase, "Except as necessary and appropriate to satisfy the requirements regarding burial trust funds" under Title XIX of the Social Security Act, transforms the proscription against disbursing excess funds to the seller into an affirmative directive that mandates that insurers do so. In addition to the fact that an exception to a proscription does not transform a proscription into an affirmative directive, IDHS has pointed to nothing in the Social Security Act that requires insurance companies to pay excess funds to the seller in any event.

43. Regardless, nothing in Section 523A.401 or any other provision of the Act requires preneed insurance companies to pay excess funds to the seller.

CONCLUSION

44. Forethought respectfully requests that the Insurance Division issue a declaratory order on the four questions presented as outlined above.

45. Communications concerning this Declaratory Petition should be directed to Forethought's undersigned counsel, whose contact information is indicated below.


46. Forethought requests a meeting with the Insurance Commissioner pursuant to Iowa Administrative Code § 191-2.7(17A).

47. Forethought will file a brief in compliance with the briefing schedule established by the Insurance Division.

WHEREFORE, Petitioner Forethought Life Insurance Company prays that the Iowa Insurance Division grant this Declaratory Petition and issue a declaratory order as set forth herein.

Dated: April 17, 2018

FAEGRE BAKER DANIELS, LLP



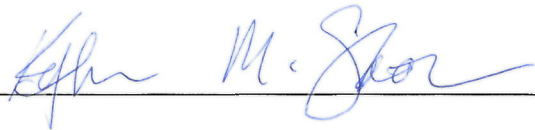
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**ATTORNEYS FOR PETITIONER
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Proof of Mailing

I certify under penalty of perjury and pursuant to the laws of Iowa that, on April 17, 2018, I hand-delivered the above Petition for Declaratory Order to the Insurance Division at the address disclosed in 191-1.2(502, 505) and mailed copies of same to the names and addresses listed below by email and by depositing the same in a United States post office mailbox with correct postage properly affixed.

Dated: April 17, 2018



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