



Jon M. Huntsman, Jr.
Governor

Gary R. Herbert
Lieutenant Governor

State of Utah

INSURANCE DEPARTMENT

D. Kent Michie
Commissioner

October 3, 2007

The Honorable
Kevin T. VanTassell
Senate Chair
Business and Labor Interim Committee

The Honorable
Stephen D. Clark
House Chair
Business and Labor Interim Committee

Dear Senator VanTassell and Rep. Clark:

I apologize that the department did not respond timely to your letter of August 31, 2007. Apparently it came into the department while I was on vacation and I did not discover it until well beyond the time to respond. Your committee staff contacted us and graciously gave another opportunity to respond prior to the October interim committee meeting.

The issue that is before the committee is an issue that the Legislative Rules Oversight Committee feels needs to be reviewed to protect the public. The committee feels that the authority to determine the criminality of a person's conduct should be exercised only by the Legislature and granting the authority to state agencies does not adequately protect the public. Several existing statutes in Utah grant authority to certain state agencies to determine by administrative rule when conduct is criminal. In the case of the insurance department, the committee is raising this question in regard to Utah Code Ann. §§ 31A-2-308(9)(a)(i), (ii), and (iii). These subsections create a class B misdemeanor if a person intentionally violates a rule of the department; intentionally permits a person over whom a person has authority to do the same; and intentionally aids any person to do the same. The concern of the committee focuses on the language applicable to a rule but does not take issue with the other parts of the statute that make such conduct criminal if an order of the commissioner is intentionally violated.

It is my understanding that two district courts in Utah have determined that such language does not offend the Utah Constitution. Those cases are *State v. Hernandex, Third District Court in and for Salt Lake County, Case No. 061903561FS, Judge Paul Maughn* and *State v. Hernandez, First District Court in and for Box Elder County, Case No. 061100061, Judge Ben Hadfield*. Judge Maughn did not issue a written opinion, however Judge Hadfield did. Both courts relied on a decision of the United States Supreme Court, *United States v. Grimaud*, 220 U.S. 506, (U.S. 1911) to conclude that a statute that authorizes rule making authority and designates conduct a crime that violates a duly promulgated rule is not an unconstitutional delegation of legislative

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authority. When the legislature established Subsections 31A-2-308(9)(a)(i), (ii), and (iii), it made the policy decision that any conduct of a person made intentionally to violate a department rule; to intentionally permit a person under the control of another to do the same; or to intentionally aid someone in violating a department rule is a crime. Such a crime is classified as a class B misdemeanor. That was the will of the Legislature when the statute was adopted. Apparently, the Rules Oversight Committee is of the belief that such a policy needs to be reversed even though the Utah and federal constitutions are not offended by such a delegation.

Intentional violation of a department rule includes an element of knowledge--that a person knows what he or she is doing and that it is against the law. Such conduct undermines the regulation of insurance, permits conduct in the market that makes the market place unstable and permits individuals and companies to engage in intentional conduct to avoid the law. Rules are generally enacted to give guidance and clarification to the market so that everyone is on the same footing and the playing field is level. Eliminating the ability of the department to pursue intentional conduct will make the playing field unlevel, give advantage to those who know that they are violating the law, and will incentivize inappropriate behavior in the market place.

It is for these reasons we encourage the committee to recommend that the department's statute not be changed.

Sincerely,

A handwritten signature in black ink that reads "D. Kent Michie". The signature is written in a cursive style with a large, stylized "D" and "M".

D. Kent Michie
Utah Insurance Commissioner

Cc: Tani Downing