



STATE OF NEW YORK  
INSURANCE DEPARTMENT  
25 BEAVER STREET  
NEW YORK, NEW YORK 10004

The Office of General Counsel issued the following opinion on March 17, 2003, representing the position of the New York State Insurance Department.

### **Lead Paint Exclusion in an Excess Line Policy**

#### **Question:**

Was it permissible for an unauthorized insurer to have issued a liability insurance policy through an excess lines broker in 1992 containing a "Lead Paint Exclusion"?

#### **Conclusion:**

Nothing in the New York Insurance Law would have prevented an unauthorized insurer from issuing a liability insurance policy through an excess lines broker containing a "Lead Paint Exclusion".

#### **Facts:**

The inquirer's inquiry relates to an insured that was issued a liability insurance policy through an excess lines broker by Insurer A, an unauthorized insurer. The policy covered the period August 20, 1992 through August 20, 1993 and contained a "Lead Paint Exclusion".

The inquirer is aware of a claim being made against the policy in question and wishes to confirm whether the exclusion was permissible.

#### **Analysis:**

Unlike many insurance policy forms issued by New York authorized insurers, insurance policy forms for policies issued by unauthorized insurers through a New York licensed excess line broker, in accordance with the provisions of N.Y. Ins. Law § 2105 (McKinney 2000 & Supp. 2001-2002), N.Y. Ins. Law § 2118 (McKinney 2000 & Supp. 2001-2002) and N.Y. Comp. Codes R. & Regs. tit. 11, Part 27 (1999) (Regulation 41), are not approved by the Superintendent of Insurance.

However, this does not mean that excess line policies may provide any kinds of terms and conditions that the insurer wants since a particular statute or regulation may be applicable to such policies. For example, N.Y. Comp. Codes R. & Regs. tit. 11, § 27.11(a) (1999) of Regulation 41 provides:

(a) No excess line broker shall procure coverage from an unauthorized insurer if such coverage is prohibited by law, including if such coverage:

(1) does not constitute insurance within the meaning of section 1101 or other sections of the Insurance Law;

(2) involves a kind of insurance not authorized under section 1113 or other sections of the Insurance Law;

(3) is not within the scope of section 2105 of the Insurance Law;

(4) is determined by any Appellate Division of the New York State Supreme Court or the New York State Court of Appeals to be against public policy in this State; or

(5) has been otherwise proscribed by law.

The Insurance Law and regulations issued thereunder do not expressly address lead paint exclusions. During the period the policy in question was issued, there was nothing in the Insurance Law that specifically restricted or otherwise limited the exclusions that could be contained in a liability insurance policy in this regard or that otherwise would have required an excess line insurer to provide coverage for damage or loss attributable to lead paint. This remains the case today. Hence, absent an amendment to the law or regulations, a lead paint exclusion would be permissible in an excess line policy.

For further information you may contact Supervising Attorney Michael Campanelli at the New York City Office.