



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

The Office of General Counsel issued the following informal opinion on July 2, 2002, representing the position of the New York State Insurance Department.

Re: Premium Increase by Unauthorized Insurer

Questions Presented:

- 1) After coverage was bound, may an unauthorized insurer increase the premium of a commercial property/casualty insurance policy that was written through a licensed excess line broker in New York?
- 2) Must such unauthorized insurer issue an endorsement to a policy, or provide some written explanation, stating why the premium was increased? Must an excess line broker provide a written or oral explanation stating the reason for an increase in premium?
- 3) Is such unauthorized insurer required to provide the insured with a grace period prior to cancelling the policy for non-payment of premium?
- 4) With respect to a commercial property/casualty insurance policy that is canceled by an unauthorized insurer for nonpayment of premium, should the unearned (and return) premium be calculated based on the premium that was charged to the insured when coverage was first bound, or on the increased premium that was charged to the insured thereafter?

Conclusions:

- 1) An unauthorized insurer that issues a commercial property/casualty insurance policy on an excess line basis is not subject to the rating requirements contained in N.Y. Ins. Law Art. 23 and § 3426 (McKinney 2000 & 2002 Pocket Part). Thus, whether such unauthorized insurer may increase the premium after coverage is bound depends upon the terms of the insurance contract.
- 2) With respect to a policy written by an unauthorized insurer, N.Y. Ins. Law § 2118(b)(1) (McKinney 2002 Pocket Part) requires an excess line broker to submit to the Excess Line Association of New York ("ELANY") a copy of the policy's declarations page, cover note, or binder within 45 days after coverage is bound. Thereafter, endorsements exhibiting a change in premium are to be sent by the excess line broker to ELANY. Thus, if a declarations page or cover note has been filed with ELANY, and the policy premium is thereafter increased or decreased, a premium change endorsement must be sent to ELANY. Where a binder has been filed with ELANY, an amended binder exhibiting the premium change must be sent to ELANY. However, there is no requirement under N.Y. Ins. Law § 2118 for the endorsement to state the reason for the change in premium. Furthermore, such unauthorized insurer is not subject to the policy form filing provisions contained in N.Y. Ins. Law Art. 23 (McKinney 2000 & 2002 Pocket Part). Hence, whether an endorsement, or other writing, must denote the reason why such insurer has increased the premium is dependent upon the terms of the insurance contract.

The N.Y. Insurance Law does not impose a specific obligation upon an excess line insurance broker to advise, whether in writing or orally, why an unauthorized insurer has increased its premium. However, such broker should make an effort to determine the cause, and to advise the insured of his findings, in accordance with N.Y. Ins. Law § 2110 (McKinney 2000), which requires an excess line insurance broker to act in a competent, honest, and trustworthy manner.

- 3) Such unauthorized commercial property/casualty insurer is not subject to the policy cancellation provisions contained in N.Y. Ins. Law § 3426 (McKinney 2000) and is not, therefore, subject to the grace period provided thereunder. In that regard, whether a grace period must be provided to the insured before cancellation of such policy takes effect depends upon the terms of the insurance contract. However, the Department has determined that N.Y. Ins. Law § 3404 (McKinney 2000), which sets forth the standard policy provisions for a fire insurance contract, applies to policies written by an unauthorized insurer through an excess line insurance broker. This section requires that a fire insurance policy include the following cancellation provision: "This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation[.]" Thus, at least with respect to the fire insurance coverage provided under the commercial property/casualty policy, the insured is entitled to a five days' written notice of cancellation.

- 4) An unauthorized insurer that issues a commercial property/casualty insurance policy on an excess line basis is not subject to the rating requirements contained in N.Y. Ins. Law Art. 23 and § 3426 (McKinney 2000 & 2002 Pocket Part). Thus, with respect to such a policy that is canceled by an unauthorized insurer for nonpayment of premium, the calculation of the unearned (and return) premium should be based on the terms of the insurance policy.¹

Facts:

A licensed insurance broker in New York has referred insureds to a licensed excess line broker, with whom it shares commission, for the placement of commercial property/casualty insurance with an unauthorized insurer. The broker stated that the unauthorized insurer increased the premium after coverage was bound without issuing an endorsement, or providing a written explanation as to why the premium was increased. The broker also stated that the excess line broker had not provided the insureds with a written or oral explanation as to why the premium had been increased, and that such excess line broker advised that if the insureds did

not pay the increased amount, the insurance would be canceled. The broker inquired whether this action is permissible, and whether an unauthorized insurer is required to provide the insured with a grace period prior to cancelling the policy due to non-payment of premium.

Analysis:

N.Y. Ins. Law § 2302(a) (McKinney 2000) states in relevant part: "This article shall apply to all kinds of insurance written on risks or operations in this state by an insurer authorized to do business in this state[.]" Thus, an unauthorized insurer is not subject to the rating requirements contained in Article 23 of the New York Insurance Law. Additionally, an unauthorized insurer that issues a commercial property/casualty insurance policy on an excess line basis is not subject to the rating requirements contained in N.Y. Ins. Law § 3426 (McKinney 2000). N.Y. Ins. Law § 3426(1)(2) states, in relevant part: "This section shall not apply to . . . policies written on an excess line basis[.]" Hence, whether an unauthorized insurer may increase the premium of a commercial property/casualty insurance policy after coverage is bound depends upon the terms of the insurance agreement.

N.Y. Ins. Law § 2118(b)(1) and (2) state:

(1) Within forty-five days after a policy is procured, a licensee shall submit the declarations page or cover note of every policy procured under his or her license to the excess line association established pursuant to section two thousand one hundred thirty of this article for recording and stamping. In the event that no declarations page or cover note is available to the licensee, within forty-five days after the policy is procured, the licensee shall submit a binder to the excess line association in lieu of such declarations page or cover note. In the event that a binder is submitted to the excess line association, the licensee shall submit the declarations page or cover note to the excess line association promptly upon receipt. Every insurance document submitted to the excess line association pursuant to this subsection shall set forth:

(A) the name and address of the insured;

(B) the gross premium charged;

(C) the name of the unauthorized insurer; and

(D) the kind of insurance procured.

(2) Subsequent endorsements which do not affect the premium charged are exempted from stamping.

Thus, an excess line broker must send ELANY a premium change endorsement where the premium has been increased or decreased after the declarations page or cover note has been filed with ELANY. Where a binder was filed with ELANY, an amended binder exhibiting the premium change must be sent to ELANY by the excess line broker. N.Y. Ins. Law § 2118 does not require that a premium change endorsement indicate the reason for a premium increase or decrease.

Furthermore, an unauthorized property/casualty insurer is not subject to the policy form filing provisions contained in Article 23 of the New York Insurance Law. Whether such unauthorized insurer must issue an endorsement, or other writing, which denotes the reason for a premium increase (or decrease), is dependent upon the terms of the insurance contract.

With respect to the excess line insurance broker who bound the commercial property/casualty insurance with the unauthorized insurer, the New York Insurance Law does not impose a specific obligation to advise, whether in writing or orally, why an insurer has increased its premium. In accordance with N.Y. Ins. Law § 2110, which requires licensed insurance brokers (and thus licensed excess line insurance brokers) to act in a competent, honest, and trustworthy manner, such broker should make an effort to determine the cause for the increase in premium, and advise the insured of his findings.

In response to the broker's inquiry regarding a grace period prior to cancellation of a commercial property/casualty insurance policy, an unauthorized insurer is not subject to the policy cancellation provisions contained in N.Y. Ins. Law § 3426², and, therefore, is not subject to the grace period provided thereunder. In that regard, whether a grace period must be provided to the insured before cancellation of such policy takes effect depends upon the terms of the insurance contract. However, the Department has determined that N.Y. Ins. Law § 3404 (McKinney 2000), which sets forth the standard policy provisions for a fire insurance contract, applies to policies written by an unauthorized insurer through an excess line insurance broker. This section requires that a fire insurance policy include the following cancellation provision: "This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation[.]" Thus, at least with respect to the fire insurance coverage provided under the commercial property/casualty policy, the insured is entitled to a five days' written notice of cancellation.

As stated above, an unauthorized insurer that issues a commercial property/casualty insurance policy on an excess line basis is not subject to the rating requirements contained in N.Y. Ins. Law Art. 23 and §3426. If an unauthorized insurer cancels such a policy for non-payment of premium, the manner in which such insurer calculates the unearned (and return) premium is thus dependent upon the terms of the insurance policy.³

For further information you may contact Senior Attorney Sally Geisel at the New York City Office.

¹ Where the policy premium is advanced under a "premium finance agreement", as such term is defined in N.Y. Banking Law § 454, an insurer, whether authorized or unauthorized, is required to calculate the unearned premium of a canceled property/casualty insurance policy as directed in N.Y. Ins. Law § 3428(d) (McKinney 2000).

² N.Y. Ins. Law § 3426(1)(2) (McKinney 2000) specifically exempts unauthorized insurers from the provisions contained in N.Y. Ins. Law § 3426.

³ See footnote 1.