



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

The Office of General Counsel issued the following opinion on April 16, 2003, representing the position of the New York State Insurance Department.

Re: Applicability of Excess Line Premium Tax to an Indian Tribe

Questions Presented:

1. For the purposes of determining whether New York's excess line laws or N.Y. Ins. Law § 2117(b) or (c) (McKinney 2000 & Supp. 2003) applies to a placement of insurance with an unauthorized insurer, would a risk located on an Indian reservation physically within New York be considered to be inside New York State?
2. If the placement of the policy with an unauthorized insurer is subject to New York's excess line laws, does the tax-exempt status of the Indian tribe exempt the excess line broker from paying the excess line premium tax on the policy?

Conclusions:

1. In regard to the placement of insurance with an unauthorized insurer for a risk located on an Indian reservation physically within New York State, such a risk would be considered to be inside New York and an excess line broker must be utilized in placing the risk with an unauthorized insurer.
2. No, the tax-exempt status of the Indian tribe does not exempt the excess line broker from paying the excess line premium tax on the policy.

Facts:

No specific facts were included. The inquiry relates to the placement of insurance with an insurer not authorized to do an insurance business in New York ("unauthorized insurer"), in connection with risks located on land belonging to an Indian tribe.

Analysis:

The first issue is whether insurance for a risk located on an Indian reservation located physically within New York State would be considered inside or outside New York State for the purposes of Insurance Law § 2117. This section prohibits any person from acting as an agent for an unauthorized insurer in the doing of any business of insurance in this State or in soliciting, negotiating or effectuating any contract of insurance or acting as an insurance broker in soliciting, negotiating, or in any way effectuating any insurance contract or in placing risks with any such insurer or in any way aiding any such insurer in effecting any insurance contract, except as provided in § 2117. Section 2117(b) and (c) contains certain exceptions under which a licensed insurance broker may place the risk with an unauthorized insurer. Otherwise, generally only an excess line broker may place insurance with an unauthorized insurer, in accordance with the excess line laws of New York, including N.Y. Ins. Law § 2105 (McKinney 2000 & Supp. 2003) and N.Y. Ins. Law § 2118 (McKinney 2000 & Supp. 2003) and N.Y. Comp. Codes R. & Regs. tit. 11 Part 27 (Regulation 41). The excess line broker may place only the kinds of insurance specified in § 2105(a) or (h).

While the inquirer did not indicate the specific nature of the risk in question (that is, whether it involves property insurance, liability insurance, etc.), generally speaking, the exceptions in § 2117(b) and (c) pertain to property or risks that are located outside of New York. Hence, if the property or risk on an Indian reservation would be considered to be outside of New York, then generally a licensed insurance broker would be able to place the risk with an unauthorized insurer without having to comply with the excess line laws. However, if the property or risk was considered to be inside New York, then the excess line laws would apply. Of particular significance, New York law requires an excess line broker to pay a fee equal to 3.6% of the premium on each excess line policy placed, but no such fee is imposed on a policy placed by a licensed broker pursuant to § 2117(b) or (c).

The first source for guidance as to whether a risk is considered in or out-of-state is N.Y. State Law §§ 2, 3, 4, 5, 6, and 7 (McKinney 1995), which establishes the boundaries of New York State. Nothing in the State Law excludes Indian reservations from being included within New York State. Also, Indian reservations are considered municipalities within the state for certain purposes. See N.Y. Exec. Law § 412(4) (McKinney 1996 and Supp. 2003); N.Y. Gen. Mun. Law § 854 (3) (McKinney 2001). Moreover, the Indian Law specifically regulates activities pertaining to reservations in New York, which further evinces legislative intent that such reservations are considered within New York.

Accordingly, it is our opinion that the Indian reservation should, for these purposes, be considered an in-state risk, thus requiring the use of an excess line broker under § 2117.

As to the second question presented, it is well established that the tax-exempt status of an Indian tribe does not extend to unrelated third parties. Specifically, the Supreme Court has made clear that "under current doctrine... a State can impose a non discriminatory tax on private parties with whom... an Indian tribe does business, even though the financial burden of the tax may fall on the... tribe." *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 175 (1989). See also *South Carolina v. Baker*, 485 U.S. 505, 522 (1989); *Oklahoma Tax Comm'n. v. Magnolia Petroleum Co.*, 336 U.S. 342, 365 (1949). Accordingly, the excess line

broker is not exempt from paying the excess line premium tax on the policy.

For further information you may contact Principal Attorney Paul A. Zuckerman at the New York City Office.