ELANY
EXCESS LINE ASSOCIATION OF NEW YORK

BULLETIN

One Exchange Plaza / 55 Broadway, 29th Floor
New York, New York, 10006-3728

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Re: Recent Department Circular Letters and Opinions

The New York State Insurance Department recently issued a number of Circular Letters and Opinions of Counsel relevant to the producer community and excess line market. These opinions by the Insurance Department have generated a number of inquiries to which this bulletin will respond. A Circular Letter is not a regulation but it is an advisory to the insurance community which explains in depth how the Insurance Department views or interprets some aspect of the insurance law as it relates to the insurance community's business practices. An Opinion of Counsel from the Insurance Department is usually issued to explain how the Insurance Department interprets the Law in relation to a specific set of facts.

CONTRACT CERTAINTY

I) **Circular Letter No. 20**, issued on October 16, 2008 encourages producers and insurers to achieve contract certainty with respect to property/casualty insurance policies and all reinsurance contracts.
Contract certainty" refers to the complete and final agreement of all terms to an insurance policy or reinsurance contract by the date of inception, and the issuance and delivery of the policy or contract before, at, or promptly after inception. The Circular Letter interprets "promptly" to mean within thirty (30) days, of policy inception.
The Circular Letter essentially asserts that prompt policy issuance is a "best practices" approach to avoid disputes and even litigation that has arisen in the past when coverage was bound but where terms and conditions were not finalized before a loss occurred which may or may not have been covered depending on the final terms of the policy.

Excess Line brokers have asked what steps they can take to adopt practices which will help achieve contract certainty. While excess line policy issuance is often in the hands of the insurance carriers, excess line brokers can:

1) Where the producer and the carrier chosen have a significant volume of business particularly in one line of coverage, the producer can request the policy be issued using particular forms by issue date based on the forms recently issued by that carrier. In many cases the choice of forms would thereby be addressed at the time of quoting instead of post binding.

2) Where the policy is a renewal, the producer can suggest the renewal policy be issued on the same forms as the expiring policy.

3) Track receipt of final policy documentation by carrier and use the results as one criteria in evaluating the quality of service provided by each carrier.

The foregoing are three simple suggestions which may help you manage your services to policyholders or customers and avoid potential errors and omission exposures.

Circular Letter No. 20 (2008) is attached for your convenience.

LATE NOTICE OF CLAIM

II) **Circular Letter No. 26**, issued on November 18, 2008, advises Property/Casualty insurers and others of recent amendments to Section 3420 of the New York Insurance Law and Section 3001 of the Civil Procedure Law and Rules with respect to establishing a "prejudice" standard as a prerequisite to denying coverage when an insured provides late notice of claim.

Section 3420 of the New York Insurance Law establishes minimum policy provisions and other requirements that apply to all liability policies (including renewals) issued or delivered in New York.

The new law requires insurers to prove that a late notice of claim materially impaired the insurer's ability to investigate or defend a claim if the notice was received within 2 years of the time required in the policy. If the notice is received more than 2 years beyond the time required in the policy, the burden is on the insured, injured person or claimant to show that the insurer was not prejudiced by the late notice.

The law also states that if an insurer disclaims liability or denies coverage based solely on the failure to provide timely notice with respect to personal injury or wrongful death third party claims, and neither the insurer or insured bring a declaration judgment action within 60 days of the disclaimer then the injured person or claimant may bring a lawsuit directly against the insurer on the sole issue as to whether the late notice disclaimer was valid.

The Circular Letter also reviews other aspects of Section 3420 and notice of claim requirements in detail. Among the most pertinent aspects of the Circular Letter and new Law are mandatory minimum policy provisions. Every liability policy issued or delivered in New York must contain language which states a failure to provide notice in accordance with the policy terms will not invalidate any claim unless the insurer was prejudiced. The Circular Letter also states if the insured, injured party or claimant can demonstrate it was not reasonably possible to provide notice in the time required but that notice was given as soon as reasonably possible thereafter coverage cannot be denied for late notice.

This forgoing is particularly important in the context of claims made policies because the new Law establishes that notice of claims made outside of the policy's loss reporting period must nevertheless be honored if notice of claim was made after expiration of the reporting period because it was not reasonably possible to report the loss with the reporting period but was reported as soon as reasonably possible thereafter.

The new Law also authorizes in certain instances injured parties or claimants to obtain from insurers a confirmation as to the existence of any insurance issued to a third party when it relates to a particular occurrence.

THE IMPACT ON EXCESS LINE INSURANCE

The Circular Letter expressly asserts that the provisions of Section 3420 apply to excess line polices, in the opinion of the Insurance Department. The Insurance Department has often asserted that statutes which apply to "all polices issued or delivered in New York" apply to excess line policies while statutes such as Section 2302 (relating to rate and form filing) which applies to insurers "authorized to do an insurance business" do not apply to excess line insurance. Language in the Circular Letter calls on insurers to amend policy provisions to conform to this new Law. While excess line insurers are not required to file forms nor seek approval, the Circular Letter notes that Insurance Law Section 3103(a) permits policies issued or delivered in the state containing provisions which violate required provisions or prohibitions can be conformed to the requirements and enforced.

Since the new provisions of Section 3420 have not yet become effective (the Law effects policies issued or delivered after January 17, 2009) no case has been brought where a Court has interpreted these provisions or their application to excess line policies.

Circular Letter No. 26 (2008) is attached for your convenience.

MIDTERM CANCELATION OF HOMEOWNERS INSURANCE

III) **Circular Letter No. 23**, issued on November 19, 2008 was issued to address the Insurance Department's position regarding mid-term cancellation of homeowners policies based upon a residence becoming unoccupied during the policy term.

The Circular Letter advises all insurers writing homeowners' policies in New York that they may not cancel policies mid-term when non-occupancy is the sole reason for cancellation, nor may they use the existence of a foreclosure action as a basis to cancel a homeowners' policy.

The cancellation of a homeowner's policy is governed by New York Insurance Law Section 3425. The Insurance Department asserts in the Circular Letter that the "non occupancy" of the home does not constitute a "physical change" to the property nor does non occupancy, standing alone constitute "discovery of willful or reckless acts or omissions increasing the hazard insured against".

ELANY has some concerns about this Circular Letter. The standard fire policy of New York which mandates certain terms be contained in every fire insurance policy expressly provides that an insured building under the policy is not covered for loss where the premises has been unoccupied beyond 60 consecutive days unless the policy provides more liberal terms. As such, it appears, absent any other consideration, insurers may be forced to continue these policy(s), earn applicable premium but deny fire losses based on that mandatory policy provision.

This Circular Letter made no mention of excess line policies. Nevertheless it is appropriate for ELANY to point out that the Insurance Department has issued several opinions in the past which assert that Insurance Law Section 3425 applies to homeowners' policies issued by excess line insurers. Excess Line insurers could consider adjusting rates or policy terms and conditions, other than cancellation provisions as a method to manage any added exposures noted in the Circular Letter.

Circular Letter No. 23 (2008) is attached for your convenience.

BAR ON PUNITIVE DAMAGE COVERAGES

IV) The Office of General Counsel of the New York State Insurance Department issued an opinion dated August 27, 2008 which addressed the legality of placing punitive damages coverage in the excess line market insuring New York risks.

The opinion reiterates the Insurance Department's long standing position citing several cases decided by New York's highest court that insuring punitive damages violates New York's public policy and is therefore prohibited.

The Insurance Department's opinion expressly states that a licensed broker may not place a punitive damage cover with an excess line insurer nor hire a third party outside of New York to do so.

Implicit but not expressly stated in this opinion is that an insured may physically leave the state and acquire insurance beyond the regulatory jurisdiction of New York provided the insured completes all aspects of the transaction outside of New York and it is done without the assistance of a New York broker, person or entity.

While legislation could be enacted to overturn the public policy prohibiting punitive damage insurance, it does not appear this has been pursued by the insurance company community.

The Opinion is attached for your convenience.

D&O INSURANCE AND THE DUTY TO DEFEND

V) The Office of General of the New York State Insurance Department issued an opinion on October 16, 2008 with regard to "duty to defend" provisions included in Directors' and Officers' (D&O) liability policies.

The opinion advises that the Insurance Department will not approve any D&O liability policy unless it includes a provision that places the duty to defend upon the insurer.

The Department relied upon implicit authority provided under Section 3420 and Insurance Regulation 107 as the basis for asserting the insurer's obligation to provide a duty to defend under D&O polices.

The opinion made no reference to excess line policies.

The Opinion is attached for your convenience.

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