



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

George E. Pataki
Governor

Gregory V. Serio
Superintendent

The Office of General Counsel issued the following opinion on June 26, 2003, representing the position of the New York State Insurance Department.

Re: Direct Placement of New York Insured With an Alien Insurer

Question Presented:

May an insurer that is not authorized to do an insurance business in New York provide insurance to a person in New York who contacts the insurer directly without the use of a New York licensed insurance broker or excess line broker?

Conclusion:

No, an insurer that is not authorized to do an insurance business in New York may not provide insurance to a person in New York who contacts the insurer directly without the use of a New York licensed insurance broker or excess line broker.

Facts:

No specific facts are provided. The inquiry is general in nature. The inquirer is a Lloyd's broker in London. We assume from the inquirer's question that he is not licensed in New York as an insurance broker. While much of the inquirer's business is done on an excess (surplus) line basis through the use of New York licensed producers, on occasion the inquirer wishes to procure insurance from an alien insurer based in Bermuda. This insurer presumably does not meet the requirements for placement on an excess line basis. The inquirer asks whether an insured located in New York may directly procure insurance from such an insurer through the inquirer's brokerage. The inquirer would issue any binder directly to the insured in New York and a New York licensed insurance broker or excess line broker would not be utilized.

Analysis:

N.Y. Ins. Law § 1102 (McKinney 2000) prohibits any person, firm, association, corporation or joint-stock corporation from doing an insurance business in New York unless authorized by a license in force pursuant to the provisions of the New York Insurance Law or exempted by the provisions of the Insurance Law from such a requirement. N.Y. Ins. Law § 1101(b)(2) (McKinney 2000 and Supp. 2003) defines doing an insurance business to include, in pertinent part:

(b)(1) Except as provided in paragraph two, three or three-a of this subsection, any of the following acts in this state, effected by mail from outside this state or otherwise, by any person, firm, association, corporation or joint-stock company shall constitute doing an insurance business in this state and shall constitute doing business in the state within the meaning of section three hundred two of the civil practice law and rules:

(A) making, or proposing to make, as insurer, any insurance contract, including either issuance or delivery of a policy or contract of insurance to a resident of this state or to any firm, association, or corporation authorized to do business herein, or solicitation of applications for any such policies or contracts...

* * *

(2) Notwithstanding the foregoing, the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, but section one thousand two hundred thirteen of this chapter shall nevertheless be applicable to such insurers:

* * *

(D) transactions with respect to policies or annuity contracts lawfully issued without this state occurring subsequent to issue, if, at the time of issue, such policies or contracts covered subjects of insurance or risks not resident or located in this state;

(E) transactions with respect to policies of insurance on risks located or resident within or without this state (except master policies or contracts of group insurance which are subject to the requirements of

subparagraph (B) hereof), which policies are principally negotiated, issued and delivered without this state in a jurisdiction in which the insurer is authorized to do an insurance business;

(F) transactions authorized by section two thousand one hundred five of this chapter with respect to excess lines insurance;

* * *

(H) transactions with respect to insurance contracts negotiated or placed pursuant to subsection (b) or (c) of section two thousand one hundred seventeen of this chapter...

Under the proposed scenario, the unauthorized insurer would be doing an insurance business in this state in making the insurance contracts directly with the insureds. Section 1101 contains certain exceptions from the definition of doing an insurance business. The relevant exceptions to the inquirer's question are quoted above. These provisions are known as the "mail-order exception" and must be effected by the insurer or its agent by mail from without the state. (This Department has concluded that the term "mail" encompasses e-mail as well). However, even if the transactions were effected by mail, the inquirer's proposal would not be permissible under any of the exceptions, for the reasons discussed below:

Subparagraph (D): The inquirer did not indicate whether the subject of the insurance or risks were resident or located in New York. However, even if they were not resident or located in this state, as required under this exception, this exception applies only to transactions subsequent to issue and where the policy was issued without this state. In this inquiry, the transactions would involve various transactions prior to issuance, including presumably solicitation, procurement, negotiation, etc. Hence, this exception would not apply.

Subparagraph (E): This provision applies without respect to the location or residence of the risks. It would not apply, however, to the inquirer's proposal for a reason similar to the one for subparagraph (D). Under this exception, the policies must be principally negotiated, issued and delivered without this state. This would not be the case here, because negotiation would be conducted with the insured in New York and the policies would be delivered to the insured in New York.

Subparagraph (F): This is the exception for excess line placements. However, the inquirer stated that an excess line broker would not be utilized. Hence, this exception does not apply.

Subparagraph (H): This exception applies to certain placements made by a licensed insurance broker, typically where the risk is located outside of New York. The specific conditions are contained in N.Y. Ins. Law § 2117(b) and (c) (McKinney 2000 and Supp. 2003). However, this exception does not apply because a licensed broker would not be utilized to procure the insurance. It should also be noted that under § 2117, as under the other exceptions noted above, no solicitation of insurance by the unauthorized insurer or its agent is permitted.

It should further be noted that, under the inquirer's proposal, not only would the insurer be in violation of § 1102, but the inquirer's brokerage would be in violation of § 2117(a), which provides that:

No person, firm, association or corporation shall in this state act as agent for any insurer or health maintenance organization which is not licensed or authorized to do an insurance or health maintenance organization business in this state, in the doing of any insurance or health maintenance organization business in this state or in soliciting, negotiating or effectuating any insurance, health maintenance organization or annuity contract or shall in this state act as insurance broker in soliciting, negotiating or in any way effectuating any insurance, health maintenance organization or annuity contract of, or in placing risks with, any such insurer or health maintenance organization, or shall in this state in any way or manner aid any such insurer or health maintenance organization in effecting any insurance, health maintenance organization or annuity contract.

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