

Bulletin No. 2015-17

October 2, 2015

RE: CONTRACT FRUSTRATION INSURANCE

The New York State Department of Financial Services (DFS) recently issued guidance to clarify its position regarding **contract frustration insurance**.

In New York, **contract frustration insurance** is considered a form of credit insurance as defined in Section 1113(a) (17) (E)* of the New York Insurance Law (NYIL). Credit insurance is one of the kinds of insurance that may be written in the excess line market pursuant to Section 2105 of the NYIL.

The DFS was asked to review a contract frustration policy issued to an employer that covered the “death or disappearance” of a designated business executive under contract. The policy provided coverage **only upon the death or disappearance** of the specified executive **and not for any other reason**.

It is the position of the DFS that “...**contract frustration insurance** is intended, in relevant part, to indemnify a business executive under an employment contract or the entity with which he/she contracts when the business executive is unable to fulfill the contract because of the business executive’s **death, personal injury by accident, sickness, ailment or bodily injury that causes disability**, where such indemnification is for the amount of financial loss that is sustained by the insured party or parties due to the inability to fulfill the terms of the contract. Because the essence of the risk is business loss arising out of the failure to perform the contract **from a number of causes**, the coverage is treated as property/casualty insurance and not life insurance or accident insurance.” (emphasis added)

DFS reviewed the contract frustration insurance policy and advised that since the policy was limited solely to risk arising from “death or presumed death” it would not fall within the meaning of subparagraph (E) of Section 1113(a)(17) of the NYIL. As such it would not constitute **contract frustration insurance** but would instead be considered life insurance which **may not be written** in the excess line market.

Therefore, any **contract frustration insurance policy** submitted to ELANY must meet the definition contained in Section 1113(a) (17) (E) of the NYIL in order to be processed. It should be noted that ELANY reviews policies based on the actual trigger of coverage to determine the type of coverage, and not based on the label printed on the policy or in the affidavit.

* Indemnifying professional sports participants (including any person who participates or expects to participate as a player, coach, manager, trainer, physician or other person directly associated with a player or a team) under contract or the teams with which the contract is made, entertainers under contract to perform or the entities with which the contract is made, or business executives under an employment contract or the entities with which the contract is made, where contracts between such persons and teams or entities cannot be fulfilled due to a sports participant’s, entertainer’s or business executive’s death, personal injury by accident, sickness, ailment or bodily injury that causes disability, where such indemnification is for the amount of financial loss that is sustained by the insured party or parties due to the inability to fulfill the terms of the contract.

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