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New York E&S Regulatory Modernization

A Common Sense Approach

Both wholesale and retail insurance brokers that have placed accounts in the New York excess line market know that the process is cumbersome. While due care in selecting financially secure insurers is paramount in all placements, gathering declination data and properly completing affidavits can be time-consuming and frustrating. Is it all truly necessary to accomplish consumer protection objectives? Can the process of obtaining and reporting declinations be streamlined, or eliminated in some cases, beyond the current content of the [Export List](#)? ELANY believes there is a better way.

At ELANY's request, New York State Senate Insurance Committee Chair Neil Breslin and Assemblymember Pamela Hunter recently introduced two bills, [S.8128/A.9117](#) and [S.8127/A.9088](#). The bills would, respectively, amend Insurance Law [§2118](#) to exempt certain commercial lines insurance transactions placed by wholesale insurance brokers from the excess line diligent effort requirement, and streamline excess line affidavits regarding declinations that are filed by retail and wholesale insurance brokers when placing excess line business. The bills would expedite service to insureds while maintaining the state's ability to protect consumers. In addition, they would significantly benefit both retail and wholesale brokers by addressing speed to market and reducing costs.

Diligent Effort (S.8128/A.9117)

The excess line diligent effort requirement mandates that prior to placing business in the excess line market, three New York-admitted insurance carriers must decline to write the requested coverage. While superior coverage can be a legitimate reason for going to the excess line market, price is not. There are circumstances where specific coverages may bypass the diligent effort, such as those listed on the New York Department of Financial Services' Export List, but most placements are subject to it. The diligent effort requirement is designed to guarantee that insurance is placed in the admitted market when available.

S.8128/A.9117 would exempt only commercial lines insurance transactions involving unaffiliated retail and wholesale insurance brokers from the diligent effort requirement,

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de facto statutorily adding them to the Export List. Why the proviso that the retail and wholesale brokers must be unaffiliated? Although ELANY does not believe that affiliated brokers “game the system” by placing business in whichever market is more financially advantageous, the bill is designed to eliminate even the appearance of such gaming by making the distinction between the wholesale and retail brokers clear. Why limit the diligent effort relief to commercial insurance placements? Doing so focuses more stringent compliance requirements on less sophisticated insureds.

The process of obtaining three declinations is time-consuming and often unnecessary, especially where wholesale brokers are involved. Retail insurance brokers that must access the excess line market through wholesale brokers are unlikely to voluntarily split their commission with a wholesaler unless they are certain that particular risk characteristics, loss history or other factors will cause their preferred admitted markets to reject the risk. It is a practical, powerful self-regulating factor. Fewer than 20% of New York-licensed insurance brokers place excess line business through wholesale brokers for an annual average of 25 transactions each. Of those brokers, 70% place less than 10 transactions with wholesale excess line brokers per year. This is a strong indicator that retailers only go to wholesalers when the retailers’ admitted markets refuse to insure a risk.

It is very important to note that even where the diligent effort is waived, insurance brokers would still be required to file insurance coverage documents and affidavits with ELANY. Only the declination data would be eliminated, as is the case with Export List coverages. The bill would maintain oversight of excess line transactions regardless of diligent effort.

Affidavit Declination Streamlining (S.8127/A.9088)

All excess line transactions are required to be filed with ELANY. Excess line broker affidavits ([Part A](#)) and where applicable, producing broker affidavits ([Part C](#)) must be filed even when declinations are not required. Where declinations are required, which is the majority of excess line placements, the burden on New York-licensed brokers is disproportionate to those placed on brokers in other states. New York is one of only 10 states that even require the filing of declination information and the only state that requires seven data elements per declination, totaling 21 for each affidavit.

S.8127/A.9088 would remove the following elements from the affidavit: declination date, reason for the declination, and name and affiliation of the declining company representative. The affidavit would continue to require the name of the declining company, the company’s National Association of Insurance Commissioners number and the reason for the broker’s belief that the admitted insurer would consider underwriting the risk. This would reduce the number of declination data elements from 21 to nine for a three-declination filing.

Many submissions to carriers are now made through web portals that generate either an electronic quote or a declination to insure the risk. A web portal declination does not provide the name of an individual or their affiliation (company employee, agent, other). The current affidavit requires this information, placing brokers in an untenable

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situation. This requirement has been the source of consternation for many a broker. Likewise, a reason for the declination may not be readily available.

The more complicated the affidavit, the more burdensome and time-consuming it is for the wholesale excess line insurance broker to obtain a properly completed Part C affidavit from the retail insurance broker for filing with ELANY. As previously noted, retail brokers that place risks in the excess line market typically do so only a handful of times per year and are therefore not intimately familiar with the affidavit process. This can lead to unnecessarily delayed transactions, which is to the consumer's detriment. A streamlined affidavit would reduce mistakes and therefore help avoid "suspended" filings, which result in delays and extra fees.

ELANY does not believe that the data elements proposed for deletion in the bill need to be part of the affidavit for effective regulatory oversight of excess line placements. Knowing the company that declined the risk and the broker's reason for belief tells the regulator everything it needs to know to judge compliance. It reveals the source of the declination and why the broker believed the declining company might consider writing the risk. This goes to the heart of the broker's diligent effort compliance.

We hope that both bills will receive bipartisan support in Albany and be enacted into law in 2022.

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