

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

IN THE MATTER OF THE 2009 ANNUAL)	
PUBLIC HEARING REGARDING)	HEARING
N.J.A.C. 11:1-34, THE SURPLUS LINES)	OFFICER'S REPORT
EXPORTABLE LIST)	

The annual Exportable List Hearing was held on Tuesday, January 12, 2010 at the Department of Banking and Insurance (“Department”) in accordance with N.J.S.A. 17:22-6.43 and N.J.A.C. 11:1-34. N.J.S.A. 17:22-6.43 provides that the Commissioner of Banking and Insurance (“Commissioner”) may declare eligible for export any class or classes of insurance coverage or risk for which, after a hearing, he or she determines that there exists no reasonable or adequate market among authorized carriers in New Jersey. This list of such risks, lines, or classes of insurance is known as the Exportable List.

The purpose of this hearing is to receive testimony and public comment from interested parties that supports the addition or deletion of items on the current Exportable List. Upon review of the relevant information, the Commissioner will decide which items, if any, should be added to the Exportable List, based upon a conclusion that there does not exist a reasonable or adequate market among authorized carriers in the State of New Jersey for those particular lines, risks or classes of insurance, and which items, if any should be deleted from the list based upon a conclusion that such a market does exist for them in New Jersey.

The Department notes that Dennis Pellegrino, Jr., representing the New Jersey Surplus Lines Association and Edward A. Tafaro, Chief Executive Officer of Exceptional Risk Advisors, testified at the hearing. The Department was seeking testimony regarding the addition of “mortgage guarantee insurance” to the Exportable List. The Department has also received

written comments from Brian S. Kern, Esq. of Argent Professional Insurance Agency, Kimberly A. Mrvica, and Jeannie B. Green.

Mr. Pellegrino testified that the Surplus Lines Association had no recommendations for addition or deletions to the Exportable List.

I. Addition of Excess Disability/Special Risk Personal Accident

Mr. Tafaro stated that he appreciated what the Department had done with respect to broadening the Exportable List Special Risk Disability and Personal Accident Coverage but believed that the scope still needs to be broadened to include other occupational classifications, such as, but not limited to, doctors, dentists, lawyers, professionals and business owners that may not be covered under the original changes. Mr. Tafaro provided examples of the types of coverages that would be precluded from being exported based on the way the Department's regulations are currently written. Mr. Tafaro stated that for example you could have a young dentist, 35-40 years old, who is diabetic, with a young family and slightly overweight. He stated that no disability insurance company on the planet would write that individual, which is important protection for that individual and his family. Mr. Tafaro testified that based on the Department's regulations as they are written now; there is no way of transacting that appropriately.

Kimberly A. Mrvica submitted written comments for the 2009 Exportable List which reflect the changes that she believes should be made to the Department's rule proposal PRN 2009-299 (regarding the Exportable List, N.J.A.C. 11:1-34.6) or, in the alternative, the current Exportable List.

Ms. Mrvica noted that she supports the Department's recent proposed amendments to the Exportable List and PRN 2009-299 (the "Rule Proposal"), but contends that there are New Jersey citizens for whom disability and personal accident coverage will remain unavailable under the Department's rules even if the Rule Proposal is adopted. She requested that the Department consider further amending the Exportable list to permit these persons to procure coverage from surplus lines insurers in accordance with the standard diligent search process under the New Jersey Surplus Lines Law. In addition, she believes the 24-month policy period limitation in proposed paragraph (b)3.iii. of the Rule Proposal should instead be moved to paragraph (b)3.iv. to more closely reflect the nature of the risks identified in those provisions.

New Jersey Citizens Impacted

Ms. Mrvica stated that although she understands that the Department's intent in the Rule Proposal is to allow automatic export to the surplus lines market of specified types of disability and personal accident insurance that provide coverage on a professional athlete, professional musician or entertainer, or executive or other person essential to a business, the current Exportable List generally prohibits the export of "health insurance" to the surplus lines market (subject to the specified exception). She stated that the Exportable List includes disability and personal accident coverage, which the Rule proposal provides is "specifically not eligible for export, since the Department has determined that it is procurable from authorized or admitted insurers after a diligent effort...." N.J.A.C. 11:1-34.6(b). Ms. Mrvica agreed that certain types of disability and personal accident insurance are in fact available from authorized/admitted insurers, and thus should not and cannot be placed in the surplus lines market. However, she contends that there are other New Jersey citizens who are unable to procure disability and

personal accident insurance from authorized/admitted insurers, such as those in the medical profession and other high income professionals who do not fit in the Rule Proposal as currently drafted. Ms. Mrvica further stated that for those citizens, the presumption that such insurance is procurable from authorized/admitted insurers is not correct, and will result in these citizens being left without coverage.

Ms. Mrvica noted in a comment letter dated December 24, 2008, (submitted by Edward A. Tafaro, CEO of Exceptional Risk Advisors, LLC), examples of some of these New Jersey citizens: a pediatric neurosurgeon who sought to insure his \$1,500,000 income against a loss due to a disability, and a dentist with health issues who was in need of similar disability income protection, neither of whom could obtain the necessary coverage in the admitted market because of the narrow standard market risk selection and underwriting criteria.

She contends that as written, the Rule Proposal would not permit these New Jersey citizens or others like them who are not professional athletes, professional musicians or entertainers, or business executives/essential persons to obtain the insurance they need to protect themselves and their families and businesses against potential financial hardship. She stated that the Department's amendments in this area should also address this segment of our state's population.

In Ms. Mrvica's suggested amendments to the Department's Exportable List, she contends that these changes would permit a "New Jersey citizen that is not a professional athlete, professional musician or entertainer, or executive or other person essential to a business to procure insurance with an eligible surplus lines insurer for any of the risks set forth in subparagraphs i. through iv. of paragraph (b)3 of the Rule Proposal after a diligent effort has been made to procure the insurance from authorized/admitted insurers." Ms. Mrvica stated that

this would bring New Jersey law generally into line with the laws in the majority of United States jurisdictions.

Ms. Mrvica stated that she understands the Department's interest in proceeding carefully with modifications to the Exportable List, particularly in the area of disability and personal accident coverage. She further states that her suggested amendments, if adopted, would not result in the export of disability and personal accident coverage to the surplus lines market that otherwise would have been procured from authorized/admitted insurers. She contends that any "disability and personal accident risks in addition to the coverage that would be placed in the surplus lines market would be coverage that is not available from authorized/admitted insurers". Authorized/admitted insurers have standard, filed products that are locked into a risk for a period of time and provide coverage only up to a specified maximum benefit amount, which does not allow for the underwriting of volatile occupations and/or high limit risks. She stated that coverage in the standard market is guaranteed renewable and non-cancelable until the insured reaches age 65, while specialty risk disability and personal accident policies are shorter in duration, sometimes for a period as brief as six months. She further stated that the compensation paid to producers for placing such coverage in the authorized/admitted market is more favorable than the compensation paid to producers for a surplus lines placement. Ms. Mrvica contends that the surplus lines market will not be competing with the authorized/admitted market for the risks currently being written in the authorized/admitted market.

In order to address the Department's immediate concerns, Ms. Mrvica suggested an additional process that will enable the Department – specifically the Department's Life and Health Office – to monitor the types of risks being placed in the surplus lines market under the usual diligent search process, that is, for insurance providing coverage on persons who are not

professional athletes, musicians or entertainers, etc. Additionally, Ms. Mrvica suggested that for an interim, trial period, such as for placements made through 2011, surplus lines licensees would submit quarterly reports with the Life and Health Office with basic information about the placement of these risks in the surplus lines market after a diligent search. Ms. Mrvica stated that to the extent the Life and Health Office has questions about the diligent search for a particular placement, the quarterly reports would promptly facilitate further inquiry. She believes that this would enhance the transparency of the surplus lines placement process for these risks to account for the change in Department policy in this area of New Jersey law. She notes that this language is incorporated in her suggested changes for the Department's consideration.

24-Month Policy Period

Ms. Mrvica stated that the 24-month policy period limitation originally proposed for paragraph 3.iv., regarding risk of financial loss caused by a contractual requirement to pay a person essential to a business who can no longer perform their duties due to death, now appears in the Rule Proposal in paragraph 3.iii, which concerns risk of accidental death in an amount equal to or exceeding \$1,000,000 in face amount only. She requested that the 24-month policy period limitation be moved from paragraph 3.iii. to paragraph 3.iv. to more closely reflect the nature of these two risks. Ms. Mrvica stated that she believes that such a policy period limitation is more appropriate for a business covering itself against the possibility of having to fulfill a contractual obligation to an essential person in the event of that person's death, as in 3.iv., because such contractual obligations are generally short-term in nature. Ms. Mrvica stated that in contrast, the risk of accidental death, as in 3.iii, is not generally a risk of limited duration.

Ms. Mrvica also suggested that as an alternative to moving the 24-month policy period limitation back to paragraph 3.iv, because the policies covering the risks in the Rule Proposal are short-term in nature, with a duration of no more than 60 months, a 60-month policy period limitation would be appropriate for all of these risks. Therefore, the 24-month policy period limitation could be removed and a 60-month policy period limitation could be applied to all risks.

Ms. Mrvica's suggested amendments follow:

(b) With the exception of [disability insurance as set forth in (b)1] **Special Risk Disability and Personal Accident Coverage as set forth in (b)3 and 4** below, the following kinds of insurance, if sold by eligible surplus lines insurers, are specifically not eligible for export, since the Department has determined that they are procurable from authorized or admitted insurers after a diligent effort:

1. Health insurance, including specific excess or aggregate excess purchased by self-funded health benefit plans, as defined by N.J.S.A. 17B:17-4. [Insurance producers may, however, request an exemption for the export of individual disability insurance. Such requests, and any exemption granted on the basis of such requests, shall be subject to the following provisions:

i. If a licensed New Jersey insurance producer, after making a diligent effort to procure an individual disability policy with an authorized insurer, finds that the coverage is unavailable in the

admitted market, he may request an exemption to export disability insurance;

ii. The request shall include copies of at least three applications to and declinations from authorized insurers, a description of the specific coverage sought and an explanation as to why the Department should permit the coverage to be exported;

iii. If granted, such an exemption shall enable the producer to place an individual disability policy with an eligible surplus lines insurer which has a New Jersey certificate of eligibility which includes accident and health;

iv. Requests that are not granted within 30 days of receipt by the Department shall be deemed disapproved; and

v. All such requests shall be submitted to:

Department of Banking and Insurance
Life and Health Office
ATTN: Gale Simon,
Assistant Commissioner
20 West State Street
PO Box 325
Trenton, NJ 08625; and]

2. (No change.)

3. **“Special Risk Disability and Personal Accident Coverage” means insurance providing coverage on a professional athlete, a professional musician or entertainer, or an executive essential to the insured’s business operations obtained by a policyholder who procures insurance:**

i. For risk of financial loss caused by the cessation of earned income due to disability from sickness, ailment or bodily injury;

ii. For risk of financial loss caused by a contractual requirement to pay an executive or other person essential to the insured's business operations who can no longer perform his or her duties due to disability from sickness, ailment or bodily injury;

iii. For risk of accidental death in an amount equal to or exceeding \$1,000,000 in face amount only ~~and with a policy period not to exceed 24 months~~, where no reasonable or adequate market exists among admitted insurers; or

iv. For risk of financial loss caused by a contractual requirement to pay an executive or other person essential to the insured's business operations who can no longer perform his or her duties due to death. Such coverage, where no reasonable or adequate market exists among admitted insurers, must be purchased in an amount equal to or exceeding \$1,000,000 in face amount only and with a policy period not to exceed 24 months.

4. Insurance providing coverage on a person that is not a professional athlete, professional musician or entertainer, or executive or other person essential to a business operation, for any of the risks listed in subparagraphs i-iv. of paragraph 3 above may be placed with an eligible surplus lines insurer after a diligent effort has

been made by a licensed New Jersey insurance producer to procure the insurance from authorized or admitted insurers. The New Jersey surplus lines producer that places such insurance shall submit a separate report to the Life and Health Office of the Department of Banking and Insurance of placements made during each calendar quarter, within 15 days after the end of such calendar quarter. Such report shall include a copy of the certification of diligent effort (Form NO. SLPS-6 CERT1) and a description of the nature of the risk and the basis of export. This reporting requirement shall apply to placements made through December 31, 2011.

(c) - (d) (No change.)

Because the revisions discussed above would constitute substantive changes to the Rule proposal requiring additional public notice and opportunity to comment they could not be made upon adoption of the proposal which occurred on June 23, 2010. (See N.J.A.C. 1:30-6.3(a)).

Based upon a review of the record and the written testimony provided it appears reasonable to amend N.J.A.C. 11:1-34.6(b) to revise the Exportable List to include the commenter's' suggested amendments to Special Risk Disability and Personal Accident Coverage. The amendment would move the 24-month policy period limitations to paragraph 3.iv. in order to clarify and more closely reflect the nature of these two risks, and add new paragraph (b)4. regarding the exception of Special Risk Disability and Personal Accident Coverage as per the above the commenter's suggestion. Notwithstanding such a change, a licensed New Jersey insurance producer would still be required to make a diligent effort to

procure the insurance from authorized or admitted insurers. The provision would also require the submission of a separate report to the Department.

II. The Addition of Mortgage Guaranty Insurance

Jeannie B. Green on behalf of the Mortgage Guaranty Insurance Companies submitted a written comment. Ms. Green stated that New Jersey has already made the legislative determination to regulate mortgage guaranty insurance as monoline insurance as have numerous other states. A mortgage guaranty insurance company is not eligible for a certificate of authority in New Jersey if it transacts any other line of insurance. Ms. Green stated that this is a foundational regulatory standard for imposing particular requirements on underwriters of mortgage insurance risk. For example, New Jersey places minimum capital, surplus, and contingency reserve requirements on mortgage guaranty insurers. (See N.J.S.A. 17:46A-1 et seq.) Adding mortgage guaranty insurance to the Exportable List undermines these financial requirements unique to the mortgage guaranty insurance industry. She contends that surplus lines insurers would be directly competing with the business currently being written by admitted insurers, but without the same financial requirements and Department oversight applicable to admitted insurers.

Ms. Green stated that the rationale for such a move is absent as there is a viable admitted market for mortgage guaranty insurance in New Jersey. The recent housing downturn has placed stress on mortgage guaranty insurers, but there continues to be a reasonable and adequate market. The strict capital, surplus and contingency reserve requirements that are imposed on mortgage guaranty insurers have helped the industry weather these difficult economic times.

Today there are six company groups writing new business in New Jersey and a new mortgage guaranty company (Essent Guaranty, Inc., NAIC N. 13634) was licensed in New Jersey just within the last six months and expects to begin writing insurance in early 2010. Admitted companies continue to meet the mortgage guaranty insurance needs of New Jersey lenders under the unique financial and other requirements applicable to them.

For these reasons, it was respectfully requested that the Department refrain from adding “Mortgage Guarantee” insurance to the Exportable List.

Based upon a review of the record and the written testimony provided, and the Department’s information, the Department does not believe that “mortgage guarantee insurance” should be added to the Exportable List.

III. . The Addition of “Surgery Centers Professional Liability”

Brian S. Kerns, of the Argent Professional insurance agency, submitted a written comment in which he requested that “Surgery Centers Professional Liability” be specifically added as an exception to the Exportable List as “(I)” under “22.(ii)(2)” (professional liability exceptions).

He states that currently exceptions under professional liability include insurance lines such as “Hospitals Professional Liability” and “Physicians and Surgeons Professional Liability,” among several others. He noted that while it seems ambulatory surgery centers are implied to be included as an exception on this list, they are not specifically named. His office had recent correspondence from the Department and it appears that the Department agrees that surgery centers already fall into an implied exception. He contends that making it explicit would clear up any confusion.

In addition to his interpretation of the existing list and statements previously made (at a prior hearing) regarding the wide availability of coverage for surgery centers in the admitted market, additional support for his comments is found in the often severely limited coverage provisions in the non-admitted market. He noted that the Department is aware that standard market carriers either offer occurrence-based coverage, or claims-made coverage that includes the option to purchase a permanent extended reporting period endorsement (tail). Some non-admitted carriers do not provide any guaranteed tail terms.

Surgery centers are particularly exposed when prevented from obtaining permanent tails, because the two-year “discovery” statute of limitations that applies to physicians in New Jersey medical malpractice cases often transfers to surgery centers, especially in vicarious liability claims.

Based upon a review of the record and the written testimony provided, and the related information of which it is aware as referenced above, the Department believes that “Surgery Centers Professional Liability” should be added as an exception to the Exportable List.

Conclusion

Based on the Department staff’s review of the record, including the written comments submitted and the testimony adduced at the public hearing, I recommend that the Exportable List found at N.J.A.C. 11:1-34 be amended. Specifically, I recommend that N.J.A.C. 11:1-34(a) and (b) be amended as set forth below. I further recommend the Department amend N.J.A.C. 11:1-34 (d) to reflect that the Department shall publish and update on its website a list of Unauthorized Insurers that qualify as Eligible Surplus Lines Insurers in New Jersey. This

change reflects the Department's current practice of publishing and updating the list of Unauthorized Insurers that qualify as Eligible Surplus Lines Insurers in New Jersey on its website.

(Revisions shown with asterisks, ***thus***)

N.J.A.C. 11:1-34

(a). The Exportable list is as follows:

1. Amusement Devices, Parks and Carnivals;
2. Animal Mortality;
3. Armored Cars;
4. Auto Racing and Race Tracks;
5. Day Care Center Liability;
6. Difference In Condition;
7. Environmental Impairment Liability Insurance;
8. Excess and Buffer Liability;
9. Excess Loss and Excess Aggregate for Self-Insurers; Public Liability and
Workers' Compensation;
10. Golf Driving Range;
11. Fine Arts Dealers;
12. First Loss and Excess of First Loss Insurance;
13. House Movers and Building Demolition;

14. Kidnapping, Ransom and Extortion Insurance;
15. Manufacturers and Contractors Liability for Floor Waxers, Building Maintenance People, Window Washers and Exterminators;
16. “Large Risks” which means any insured:
 - i. Which procures insurance for any property casualty risk by use of the services of either an employee who is a full-time insurance manager or buyer, or a regularly and continuously retained qualified insurance consultant; and
 - ii. Whose aggregate commercial premiums for insurance (excluding, Life, Health and Accident, Annuities and Workers’ Compensation insurance) total at least \$500,000;
17. Motor vehicle coverage as follows:
 - i. Physical Damage Coverage for Limousines; and
 - ii. Physical Damage Coverage for Trucks, including trailers and trailer interchange (over 10,000 pounds) for Non-Fleet (one to five) risks, and commercial fleet (over five) risks irrespective of gross vehicle weight;
18. Mortgage Impairment;
19. Pony Rides/Riding Academies;
20. Physical Damage Coverage for Private Passenger and Commercial Vehicles with an original cost new of \$60,000 or above;
21. Product Liability Products or Products Recall Coverage;
22. Professional Liability insurance as follows:
 - i. Errors and Omissions; and
 - ii. Professional Liability except:

- (1) Legal malpractice liability;
- (2) Medical malpractice liability
 - (A) Hospitals Professional Liability
 - (B) Physicians and Surgeons Professional Liability
 - (C) Dentist Professional Liability
 - (D) Employees Professional Liability
 - (E) Nurses Professional Liability
 - (F) Optometrists Professional Liability
 - (G) Physiotherapists Professional Liability
 - (H) Chiropodists Professional Liability
 - *(I) Surgery Centers Professional Liability***

23. Short Term Events;

24. Skating Rinks (Roller and Ice) and Skate Board Parks;

25. Swim Clubs/Swim Pools;

26. Vacant and Unoccupied Building;

27. Warehouseman's Legal Liability;

28. Automobile Personal Injury Protection (PIP) coverage in excess of \$250,000;

29. Commercial auto liability for taxi cabs and limousines; (Eligible Surplus Lines insurer's certificate of eligibility must state that they are permitted to write this risk.)

30. Commercial auto liability for intermediate and long-haul trucking; (Eligible Surplus Lines insurer's certificate of eligibility must state that they are permitted to write this risk.)

31. Liquor Liability;
32. Employment Practices Liability;
33. Livestock Gross Margin Policies; and
34. Gap Coverage for Private Passenger and Commercial Automobile.

(b) With the exception of Special Risk Disability and Personal Accident Coverage as set forth in (b)3 ***and 4*** below, the following kinds of insurance, if sold by eligible surplus lines insurers, are specifically not eligible for export, since the Department has determined that they are procurable from authorized or admitted insurers after a diligent effort:

1. Health insurance, including specific excess or aggregate excess purchased by self-funded health benefit plans, as defined by N.J.S.A. 17B:17-4.
2. Annuities including Funding Agreements or Guaranteed Investment Contracts (GIC's) as defined by N.J.S.A. 17B:17-5.
3. "Special Risk Disability and Personal Accident Coverage" means insurance providing coverage on a professional athlete, a professional musician or entertainer, or an executive essential to the insured's business operations obtained by a policyholder who procures insurance:
 - i. For risk of financial loss caused by the cessation of earned income due to disability from sickness, ailment or bodily injury;
 - ii. For risk of financial loss caused by a contractual requirement to pay an executive or other person essential to the insured's business operations who can no longer perform his or her duties due to disability from sickness, ailment or bodily injury;

iii. For risk of accidental death in an amount equal to or exceeding \$1,000,000 in face amount only [and with a policy period not to exceed 24 months,] where no reasonable or adequate market exists among admitted insurers; or

iv. For risk of financial loss caused by a contractual requirement to pay an executive or other person essential to the insured's business operations who can no longer perform his or her duties due to death. Such coverage, where no reasonable or adequate market exists among admitted insurers, must be purchased in an amount equal to or exceeding \$1,000,000 in face amount only ***and with policy period not to exceed 24 months** .

4. Insurance providing coverage on a person that is not a professional athlete, professional musician or entertainer, or executive or other person essential to a business operation, for any of the risks listed in subparagraphs i.-iv. of paragraph 3 above may be placed with an eligible surplus lines insurer after a diligent effort has been made by a licensed New Jersey insurance producer to procure the insurance from authorized or admitted insurers. The New Jersey surplus lines producer that places such insurance shall submit a separate report to the Life and Health Office of the Department of Banking and Insurance of placements made during each calendar quarter, with 15 days after the end of such calendar quarter. Such report shall include a copy of the certification of diligent effort (Form NO. SLPS-6CERT1) and a description of the nature of the risk and the basis of export. This reporting requirement shall apply to placements made through December 31, 2012.

(c) Life insurance is specifically not eligible for export pursuant to N.J.S.A. 17:22-6.40 et seq.

(d) The Department shall [annually] publish **and update** [a notice in the New Jersey Register, which lists] **on its website a list of** Unauthorized Insurers that qualify as Eligible Surplus Lines Insurers in New Jersey.

12/03/10
Date

/s/ DeWayne H. Tolbert
DeWayne H. Tolbert
Hearing Officer

DHT10-01/INOORD