

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

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| IN THE MATTER OF THE 2014 ANNUAL) | |
| PUBLIC HEARING REGARDING) | HEARING OFFICER'S |
| <u>N.J.A.C. 11:1-34, THE SURPLUS LINES)</u> | REPORT |
| INSURANCE EXPORTABLE LIST) | |

The annual Exportable List hearing was held on Thursday, December 18, 2014, at the Department of Banking and Insurance (“the 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 (“the Commissioner”) may declare generally 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. The 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 support the addition or deletion of items on the current Exportable List. Upon review of the relevant information, the Department will decide which items, if any, should be added to the Exportable List, based upon a determination 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 in New Jersey for those items. At the hearing, testimony was heard regarding the addition of “transportation company contingent liability for workers compensation.”

Testimony at the Hearing

Mr. Steven Powell, testified on behalf of the New Jersey Surplus Lines Association. Mr. Powell testified that the Surplus Lines Association favored no changes to the current Exportable List.

Mr. DiUbaldo, Senior Vice President and Counsel, State Government and Industry Affairs, with ACE USA also testified at the hearing. Mr. DiUbaldo testified that he was requesting the addition of “transportation company contingent liability for workers compensation.” Mr. DiUbaldo stated that the product is designed to fill a void in the transportation industry. He testified that this item is intended for the trucking industry, specifically independent contractors. Mr. DiUbaldo stated that companies usually hire independent contractors to drive trucks or engage in the trade, and independent contractors are not required to be covered by workers compensation, and they generally are not covered. Mr. DiUbaldo asserted that when an independent contractor is injured in the course of employment, they often apply for workers compensation benefits even though they are an independent contractor and not entitled to such benefits. He also contends that if the trucking company has workers compensation coverage for its employees, the company often reports workers compensation claims by independent contractor drivers to the company’s workers compensation carrier and the carrier will defend and seek recoupment at some point for the legal fees and/or any paid benefits. If there is no workers compensation carrier in place, then the employer may be left without insurance coverage for any workers compensation claims by independent contractors for which a court and/or adjudicating body may later determine that the company should be liable. Mr. DiUbaldo stated that this contingent coverage is only available in the

excess and surplus lines marketplace, as it is not currently offered in New Jersey by an admitted carrier.

Mr. DiUbaldo asserts that if the Department adds “transportation company contingent liability for workers compensation” to the Exportable List, it will fill that coverage void. He contends that this coverage is available for defending against the independent contractor’s claim. In addition, if there was a good faith omission and it is found that the independent contractor was determined to be eligible for benefits, then this coverage would pay the benefit. Mr. DiUbaldo further stated that the addition also eliminates the need for a protracted dispute resolution or litigation between the workers compensation carrier and the trucking company or the company’s workers compensation carrier, and it makes sure that the interests of these independent contractors are protected. Mr. DiUbaldo believes that the addition of this coverage to the Exportable List would provide easier access to this type of coverage and is beneficial to New Jersey policyholders and to the economy of this State. Mr. DiUbaldo submitted a letter to the Department which also supported the addition of this coverage to the Exportable List.

Recommendation

Based upon a review of the record, including the testimony provided and written documentation submitted, there does not exist a reasonable or adequate market among authorized carriers in the State of New Jersey for “transportation company contingent liability for workers compensation.” Consequently, it is appropriate that transportation company contingent liability for workers compensation should be added to the Exportable List.

Based on the Department staff’s and my review of the record, including the written documentation submitted and the testimony adduced at the public hearing, I recommend that the

Exportable List recited in N.J.A.C. 11:1-34 be revised. Specifically, I recommend that N.J.A.C. 11:1-34(a) be amended as set forth below to add “transportation company contingent liability for workers compensation” to the list of items designated therein as eligible for export.

Revisions shown with asterisks, ***thus***, deletions indicated with brackets [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;
34. Gap Coverage for Private Passenger and Commercial Automobile;
35. Flood insurance for primary and excess coverage[.]*; **and**
- 36. Transportation company contingent liability for workers compensation.***

(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 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 publish and update on its website a list of Unauthorized Insurers that qualify as Eligible Surplus Lines Insurers in New Jersey.

8/24/15
Date

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

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