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**REPORT ON LEGISLATION BY THE
COMMITTEE ON INSURANCE LAW**

**A.5631
S.3858**

**M. of A. Morelle
Sen. Seward**

AN ACT to amend the insurance law, in relation to domestic excess line insurance companies.

The Committee on Insurance Law of the New York City Bar Association is pleased to have this opportunity to comment on A.5631/S.3858 (the "Excess Line Legislation"), which would amend the New York Insurance Law (NYIL) by adding a new Article 58 authorizing domestic excess line insurance companies. A prior version of the Excess Line Legislation was approved by the last Senate on June 12, 2012 and was not brought to a vote in the last Assembly. This Committee submitted a report on such prior bill on June 14, 2012, which supported the legislation conditionally.¹

The Committee on Insurance Law comprises lawyers representing a diverse cross-section of the insurance community, including lawyers in private practice, in-house counsel at insurance carriers and producers across multiple lines of insurance business, trade association officials, regulators, policyholder lawyers, insurance arbitrators and other types of insurance professionals. This report represents the views of the Committee as a whole; it does not necessarily represent the views of any individual members of the Committee or their respective law firms, clients or employer organizations or, in the case of Committee members employed by governmental agencies, the views of any governmental official, agency or branch.²

Introduction and Summary Position

We note that the pending Excess Line Legislation reflects most of the comments made in our June 14, 2012 submission. We applaud the drafters for incorporating these points and

¹ A.9783/S.6808, 235th Session (N.Y. 2012)

² This letter was prepared by a subcommittee of the Committee on Insurance Law chaired by Dan Rabinowitz and also comprising Peter Bickford, Francine Semaya, Robert Fettman, Jill Levy, Leah Campbell, Frederic Garsson, Matthew Gaul, and Eric Suben.

Committee members Robert Easton, Executive Deputy Superintendent of Financial Services; Maria Filipakis, Executive Deputy Superintendent of Financial Services; Dennis Hayes, Chief Executive Deputy Director of the New York State Insurance Fund; and Joana Lucashuk, Senior Attorney with the Department of Financial Services, have recused themselves from all Committee deliberations on the position expressed herein.

believe that these changes have improved the legislation. With respect to two of our comments from that submission, however (relating to (i) the application of other provisions of the Insurance Law and (ii) the availability of "independently procured" coverage), we remain concerned about potential ambiguities in the text although we continue to view the legislation favorably as a general matter.

Accordingly, the Committee supports the Excess Line Legislation subject to the following two qualifications.

Application of Insurance Law to Domestic Excess Line Insurers

First, we note that proposed new Sections 5805-5807 of the NYIL³ identify the provisions of the NYIL that do and do not apply to domestic excess line insurers (DELIs). As we did in our June 2012 report on the prior bill, the Committee would respectfully suggest a clearer, more abbreviated statement of the purposes of the new law, which we understand is to impose some but not all of New York insurance law on a new class of excess line insurer. We agree with the implicit premise of the legislation, which is to subject such carriers to regulatory oversight without, however, restricting their ability to conduct business as writers of excess line coverage in this State.

If the legislature prefers, instead, a more exhaustive listing of provisions that do and do not apply to DELIs, we would urge the legislature to clarify the existing language. The bill lacks a crisp, integrated statement identifying which laws will and will not be imposed on DELIs.

For instance, we note that the bill includes no fewer than two provisions (Section 5806(a) and Section 5806(c), each of which is modified by "except as" and other qualifying clauses) setting forth which provisions apply to DELIs and three *other* provisions setting forth exemptions (Section 5806(b), Section 5806(d) and Section 5807). This does not even count the basic provision (Section 5805) exempting DELIs from rate and form requirements. Further, in the language quoted above from Section 5806(c), the requirement that DELIs are "subject" to provisions that "expressly exempt" them (*see* subclause (2)) arguably creates an irreconcilable self-contradiction. Altogether, this patchwork approach in outlining the new DELI legal regime invites interpretive ambiguity and commercial uncertainty.

As an additional example of possible ambiguity, the use of "or" and then "and" at the end of the following subclauses raises interpretive questions and obscures the drafters' true intent:

"except as modified by this Article, [DELIs] are subject to each provision of [NYIL] which

(1) apply broadly to insurance policies issued or delivered in NY and not exclusively to authorized insurers *or*

(2) expressly apply to or exempt excess line insurance policies . . .
and

³ Excess Line Legislation, §1.

(3) are set forth in any of the following. . . "

(emphasis added).

This can be read to impose subclause (1) disjunctively (optionally) with (2) and (3) read together. Alternatively, there could be optionality between (1) and (2), and the result of that selection would be conjunctive (additive) with subclause (3). It is not clear which result the drafters intend. A more categorical approach such as we suggest herein could clarify this intent.

Independently Procured Coverage

Second, new Section 5802 essentially prohibits a DELI from writing coverage to a New York-based insured who attempts to independently procure it.⁴ The apparent intent is to require such an insured to use an excess line broker. We take no issue with this requirement as a matter of policy. However, some affirmative statement expressly *permitting* such coverage to be written through a broker would help clarify it. (As currently drafted, it is framed as a prohibition, which could dissuade carriers and insureds from trying to use the statute.) Although this is implicit in the existing draft, stating it expressly would avoid any doubt and would articulate more clearly the intended role of brokers in intermediating excess line coverage within the state even where a *domestic* excess line carrier is involved.

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As stated in the preface to our specific comments, and subject to the foregoing qualifications, the Committee supports the Excess Line Legislation. The Committee would be delighted to discuss with you or your staffs any of the foregoing points or any other matters in connection with the bill, and to work with you to amend the legislation in the ways we are suggesting.

May 2013

⁴ *Id.*