

April 13, 1982

SUBJECT: INSURANCE

CIRCULAR LETTER NO. 7 (1982)

DATED: APRIL 13, 1982

TO: ALL LICENSED EXCESS LINE BROKERS AND LICENSED PROPERTY AND CASUALTY, LIFE AND ACCIDENT AND HEALTH INSURERS

SUBJECT: PLACEMENT OF EXCESS AGGREGATE STOP LOSS COVERAGE FOR SELF-INSURED EMPLOYEE BENEFIT PROGRAMS

It has come to the attention of this Department that excess line brokers have placed Excess Aggregate Stop Loss policies with unlicensed insurers. Under these policies the insurer agrees to indemnify an employer for losses incurred under a self-insured employee benefit plan in excess of a specified loss limit. The indemnity will apply if the insured becomes obligated and does in fact make benefit payments on behalf of employees of the insured under a contract with such employees to provide payments in the event of bodily injury, sickness or disease but only to the extent that such obligations and payments exceed in the aggregate the specified loss limit.

Certain excess line brokers have taken the position that the policy provides a "stop loss" cover for contractual liability assumed by the named insured and therefore, such policy may be written with not-admitted insurers pursuant to Section 122 of the New York Insurance Law.

This Department has also received inquiries as to whether the placement may be considered reinsurance.

Please be advised that this Department has ruled that the coverage provided by the above described policy is considered to be "accident and health insurance" as defined in Section 46(3) of the New York Insurance Law. Such policies are not liability insurance within the meaning of Section 46(13) of the New York Insurance Law nor are they contracts of reinsurance for the following reasons:

Section 46(13) defines personal injury liability insurance as:

"13. 'Personal injury liability insurance,' meaning insurance against legal liability of the insured, and against loss, damage or expense incident to a claim of such liability, and including an obligation of the insurer to pay medical, hospital, surgical and disability benefits to dependents, beneficiaries or personal representatives of persons who are killed, irrespective of legal liability of the insured, arising out of the death or injury of any person, or arising out of injury to the economic interests of any person as the result of negligence in rendering expert, fiduciary or professional service, but not including any kind of insurance specified in paragraph fifteen. . ."

According to policies that we have reviewed, the benefits provided are not confined to expenses due to injury but include reimbursement for expenses incurred due to sickness and disease.

Sickness and disease are not among the risks set forth in Section 46(13), which provides for insurance limited to reimbursement for liability for injuries, for loss due to professional malpractice, or for breach of fiduciary duty. Since the excess loss contracts provide for payments in the event of sickness and disease they provide insurance benefits authorized by Section 46(3) and not Section 46(13). Therefore, the policy form cannot be one for personal injury liability insurance as defined in Section 46(13).

Since the underlying benefits to be provided by the self-insured employer are not limited to any specific cause such as the maintenance or operation of a motor vehicle, aircraft, elevator, or boiler; or arising out of work-related injury or disease, the benefits provided by the excess loss contract do not qualify as a contract for any form of insurance authorized by Section 46 of the Insurance Law except accident and health insurance defined in subdivision 3 of that section.

Section 122(1) of the New York Insurance Law does not authorize the placement of accident and health insurance by an excess line broker with an unauthorized insurer.

The transaction may not be considered reinsurance. Reinsurance is a contractual arrangement under which an insurer (ceding) buys insurance from another insurer (assuming) to cover part or all of the losses incurred by the ceding insurer under insurance contracts the ceding insurer issued to insureds. Since a reinsurance agreement is a contract between two insurers, and an employer who is self-insured is not an insurer as defined under the New York Insurance Law, the employer cannot enter into a reinsurance contract.

All licensed excess line brokers are, therefore, directed to cease and desist from writing stop loss contracts of the type described above with insurers not authorized to do such insurance business in this State. All such policies now in effect should not be renewed on the policies' anniversary or expiration date; however, no such contract shall remain in force after December 31, 1982.

Any excess line broker that has placed such business is requested to acknowledge receipt of this letter, within 15 days of its date, and provide this Department with a statement of action taken pursuant thereto. Acknowledgements should be sent to:

Vincent G. Werling, Associate Examiner
Insurance Exchange and Excess Line Bureau
New York State Insurance Department
Two World Trade Center
New York, NY 10047-002

Very truly yours,

[SIGNATURE]

ALBERT B. LEWIS

Superintendent of Insurance