



**COMPLIANCE
ADVISOR**

**LIMITATIONS ON WHICH TYPES
OF COVERAGE CAN BE PLACED BY
EXCESS LINE LICENSEES**

A PUBLICATION BY

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For the benefit of all excess line brokers, and particularly the many new nonresident excess line brokers, this is to offer a detailed list of what coverages you cannot place with eligible E&S insurers. Hopefully, underwriters and insurers will also use this guide to avoid issuing a policy on a New York risk only to have the excess line broker ask that it be cancelled flat later on because the placement violated New York law.

Most types of property, casualty and surety coverages can be written as excess and surplus lines subject to performing a diligent search and otherwise complying with the excess line law. ([i])Insurance Law Section 2105 authorizes excess line brokers to place certain "kinds" of insurance as defined in Insurance Law Section 1113. The "kinds" of insurance not listed in Section 2105 cannot be placed by excess line brokers. The following identifies what products **cannot** be written as excess line products in New York and sets forth limitations on certain lines of business.

1. LIFE INSURANCE/ANNUITIES

No products in these lines of business can be written for New York residents as excess line products.

2. ACCIDENT AND HEALTH

No standard type accident and health products can be written as excess line products. Accidental Death and Dismemberment cannot be written.

Two exceptions that arguably fall in this category are:

- a. Salary protection insurance, which is essentially high excess disability coverage and/or disability coverage protecting the insured's loss of income that licensed insurers will not write, and
- b. Nonappearance insurance, which is called "Contract Frustration" insurance under New York law. (In New York, this coverage is considered a type of "credit" insurance.) This coverage applies to losses suffered under a contract when due to death, personal injury by accident, sickness, ailment or bodily injury that causes disability, a professional athlete, a professional entertainer or a business executive cannot perform a contract. This type of coverage can be purchased by either party to the contract.

3. WORKERS COMPENSATION INSURANCE

No form of workers compensation insurance can be placed in the excess line market. The law does not permit carve outs such as writing employers liability (Part B) coverage in conjunction with other liability lines. You cannot place excess workers compensation over an individual company or affiliated groups qualified self-insured retention. U.S. Longshore and Harborworkers Compensation (USLH) insurance will not be stamped by ELANY as it is

substantially similar to workers compensation insurance and is available for purchase from the New York State Workers Compensation Fund.

4. MORTGAGE GUARANTY INSURANCE

Mortgage Guaranty Insurance cannot be placed as an excess line product. This coverage insures a lender against financial loss if the borrower defaults on an instrument of indebtedness secured by a lien on real estate. **[Banks that buy forced placed or vendor single interest coverage when a homeowner/borrower fails to maintain a homeowner's policy is permitted.]**

5. FINANCIAL GUARANTY INSURANCE

Financial Guaranty Insurance, as defined in New York Insurance Law § 6901, cannot be written as excess lines insurance. The complete definition of this type of coverage is beyond the scope of this paper, but generally speaking it is coverage for financial loss when any obligor fails to pay on a debt instrument or monetary obligation because of a default or insolvency.

6. OTHER PROHIBITED COVERAGES

- a. The following kinds of insurance coverage, specifically defined in Section 1113 of the Insurance Law, may not be placed in the excess line market:

- GAP Insurance
- Legal Services Insurance
- Title Insurance
- Credit Unemployment Insurance
- Involuntary Unemployment Insurance

- b. Other specific kinds of insurance coverage, defined elsewhere in the New York Insurance Law, are prohibited from placement in the excess line market as follows:

- Group Credit Unemployment
- Credit Card, Debit Card or Checking Account Group Policies
- Product or System Group Insurance Policies
- Identity Theft Group Insurance Policies
- Group Property Travel Insurance Policies
- Group Policy for Service Providers
- Self-Service Storage Company Group Insurance Policies
- Sponsored Group Personal Insurance

Additionally, the New York State Department of Financial Services (DFS) has opined that the following kinds of insurance coverage may not be written in the excess line market:

- Litigation Cost Protection Insurance
- Contractual Bonus Insurance
- Legal Expense Insurance
- Patent Infringement Abatement Insurance
- Patent Defense Insurance (without substantial liability coverage)
- Owner-Operators (Truckers) Occupational Accident Insurance
- Surrogate/Fertility (A&H) Insurance

A number of coverages can be written as excess line products but are subject to limitations and restrictions.

1. AUTO LIABILITY INSURANCE

Can be written on an excess basis but the primary coverage must be written by an admitted insurer or by a qualified self-insured retention. Also, garage liability, named non-owner, physical damage, and transportation network company (TNC) group insurance can be written on an excess line basis.

2. MEDICAL MALPRACTICE COVERAGE

Primary coverage for doctors, dentists and “general hospitals” must be written by licensed insurers, qualified self-insurers or by the residual market, the Medical Malpractice Insurance Pool (MMIP), unless you obtain 3 declinations, one of which must be from the MMIP.

Excess medical malpractice liability coverage can be written by excess line insurers.

Nursing homes, convalescent centers, testing labs, diagnostic facilities and the like can be insured on a primary basis in the New York excess line market. [You must disclose the availability of the Medical Malpractice Pool to the insured and obtain a written consent from the insured, however, as set forth in Regulation 41 Section 27(3)(e)(2).]

There are several other restrictions to keep in mind.

1. GROUP COVERAGE/MASTER POLICIES

Generally, insurance of unaffiliated groups or use of master policies is prohibited subject to certain exceptions such as Risk Purchasing Groups under the federal Risk Retention Act or Employer Sponsored Group Excess Coverage which is specifically permitted.

2. 11 NYCRR 27 (REGULATION 41) STATES THAT:

No excess line broker shall procure coverage from an unauthorized insurer if such coverage is prohibited by law, including if such coverage:

- a. does not constitute insurance within the meaning of section 1101 or other sections of the Insurance Law;
- b. involves a kind of insurance not authorized under section 1113 or other sections of the Insurance Law;
- c. is not within the scope of section 2105 of the Insurance Law;
- d. is determined by any Appellate Division of the New York State Supreme Court or the New York State Court of Appeals to be against public policy in this State; or
- e. has been otherwise proscribed by law.

EXEMPT TRANSACTIONS

Certain transactions are exempt under provisions of Section 1101 or 2117 of the law. For example, ocean going marine insurance is exempt from the excess line law. HOWEVER, if any material part of the risk is inland marine such as warehouseman's liability, the risk must be placed pursuant to the excess line law and the premium attributable to the inland marine portion of the risk is subject to the excess line tax.

DFS Circular Letter No. 22 (2000) summarizes the DFS's analysis in this regard.

The message is to view these exemptions very narrowly. That is how the DFS views them.

CONCLUSION

Compliance with the New York excess line law in its simplest terms requires the following:

1. Only an excess line licensee can place an excess line transaction,
2. When there is a retail producing broker seeking coverage through a wholesale excess line broker, the producing broker must have a New York broker's license (not an agent's license),
3. Risks can only be placed with eligible excess line insurers,
4. Place only the types of coverage permitted by the excess line law. Follow these guidelines and you have eliminated many of the regulatory pitfalls that exist for licensees.

[i] The kinds of insurance defined in Section 1113 which excess line brokers are permitted to place are: Fire, Miscellaneous Property, Water Damage, Burglary and Theft, Glass, Boiler and Machinery, Elevator, Animal, Collision, Personal Injury Liability, Property Damage Liability, Fidelity and Surety, Credit, Motor Vehicle and Aircraft Physical Damage, Marine and Inland Marine, Residual Value, Prize Indemnification, Service Contract Reimbursement and Salary Protection.



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