

September 14, 2016

14100.0090

Via E-mail

Rulescoordinator@oic.wa.gov

Attn: Lorie Villaflores

**Re: Proposed Rules Relating to Emergency Orders and Authority of Insurance
Commissioner to Issue Emergency Orders Affecting Surplus Lines Insurance
Policies Issued Outside the State of Washington**

Dear Ms. Villaflores:

We represent the Surplus Lines Association of Washington. The Association's broker members facilitate placement of insurance in this state covering risks not being covered by admitted insurers, which insurance is very important to insureds in this state. Such insurance policies are typically issued outside the State of Washington. These policies are governed by freedom of contract principles not necessarily fully applicable to admitted insurers.

Recently, the Washington Insurance Commissioner gave formal notice of its intent to adopt regulations relating to its authority in situations where the Governor proclaims a state of emergency under RCW 43.06.010(12). The proposed regulations attempt to give the Commissioner very broad powers purportedly authorized under RCW 48.02.060. That statute provides, in relevant part, that the Commissioner "may issue an order that addresses any or all of the following matters related to *insurance policies issued in this state*:

- (a) Reporting requirements for claims
- (b) Grace periods for *payment* of insurance premiums and performance of other duties by insureds
- (c) Temporary postponement of *cancellations and non-renewals...*" (emphasis added).

Critically, the Commissioner's power to issue orders in cases of emergency is expressly limited by the statute to insurance policies "*issued in this state.*" By contrast, other statutes within the Insurance Code expressly extend their reach beyond just policies "issued in this state." For example, RCW 48.18.200 applies to policies that are "delivered or issued *for delivery* in this state and covering subjects located, resident, or to be performed in this state." (emphasis added).

The use of different language in these two statutory sections indicates that the legislature intended them to have different meanings. *See, e.g., State v. Roggenkamp*, 153 Wn.2d 614, 625-626, 106 P.3d 196 (2005) ("it is well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word."). Here, the legislature chose to have RCW 48.02.060 apply solely to policies "issued in this state" and not policies "delivered or issued for delivery in this state." The legislature's use of different and more limited language in RCW 48.02.060 evidences a clear intent that the statute have a more limited reach. The effect is that the statute does not apply to insurance policies issued outside of the state of Washington, as most surplus lines policies are (for example, by the insurer at its headquarters in another state or country).

The Surplus Line Association of Washington is concerned that RCW 48.02.060, if read so broadly, and the proposed regulation language directing insurers to extend contractual payment periods in insurance contracts, postpone contractual cancellation and non-renewal of policies,¹ and to "excuse policy holders from performing *other* statutory or contractual duties" (emphasis added) is well beyond the kinds of regulations that exist in most other states. Such

¹ Any attempt to modify contractual payment, cancellation, and non-renewal provisions of surplus line policies after the fact not only impairs the Constitutional contract rights of the contracting parties, but also contradicts the provisions of RCW 48.18.290(5), the last phrase of which specifically exempts surplus line insurers from statutory cancellation/non-renewal requirements.

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impairment of contracts could very well make it more difficult for Washington to attract quality surplus line insurers to insure against some of the varied types of events that are of concern, including both earthquakes and floods, as well as other natural disasters, which are often the subject of surplus line insurance. Thus, the Association believes that the proposed regulations could very well have adverse consequences as to availability of insurance in this state.

The very broad language in the proposed regulations concerning directions to insurers to excuse performance of unspecified "other statutory or contractual duties" (WAC 284-02-130) is an example of the kind of broad language that may have the consequence of making coverage more difficult to obtain in this state from surplus line insurers. The Association has similar concerns as to the broad and open-ended language regarding extending times for payment and postponement of cancellation or non-renewal of policies.

We believe *voluntary* insurer cooperation is likely a more productive approach that will help insureds both more effectively to *obtain* insurance (including surplus line insurance) and protect such insurance in emergency situations. The Association is not aware of situations where requests for reasonable voluntary cooperation have been unreasonably refused in this state.

Sincerely,

WILLIAMS KASTNER & GIBBS PLLC



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cc: Bob Hope