



STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

David A. Paterson
Governor

Eric R. Dinallo
Superintendent

Circular Letter No. 20 (2008)
October 16, 2008

TO: All insurers, reinsurers and insurance producers

RE: Contract certainty

STATUTORY REFERENCE: N.Y. Insurance Law §§ 107, 201, 301, 308, 1114, 2110, 2118, and 3103; and Arts. 23, 31, 34, 61, 63, 64, 65, 66, 67, and 69.

This circular letter sets forth the New York State Insurance Department's position and expectations regarding contract certainty with respect to property/casualty insurance policies and all reinsurance contracts.

"Contract certainty" refers to the complete and final agreement of all terms to an insurance policy or reinsurance contract by the date of inception, and the issuance and delivery of the policy or contract before, at, or promptly after inception. Contract certainty provides greater clarity among insurers (including reinsurers), insureds (including ceding insurers), and producers as to the nature and scope of coverage provided.

Since most policies are written on standardized forms and are subject to prior approval of the Superintendent, this circular letter focuses on those policies where, because of the unique nature or size of the risk, issues regarding contract certainty are most apt to surface. Such policies include those issued to: (1) large commercial insureds, written on a manuscript basis; (2) the special risk market, written pursuant to Insurance Law Article 63; (3) policyholders in the excess line market; and (4) other insurers via reinsurance.

A lack of contract certainty affects participants in two distinct ways:

- (i) Uncertainty ensues when all terms and conditions have not been clearly agreed upon between the insurer and the insured before coverage commences; and

- (ii) The lack of appropriate evidence or documentation of coverage that contains the terms, conditions, and date upon which coverage commences, particularly when the evidence or documentation is not issued before, at, or promptly after the inception of the coverage.

Thus, a lack of contract certainty may give rise to situations where insureds do not know what coverage they have actually obtained, and may assume that they are covered for certain risks when, by the terms of the final contract, they are not. A lack of contract certainty also can result in insureds having broader coverage than they had identified, needed, or desired. In such situations, insureds and insurers alike bear unintended risks and costs.

This uncertainty exposes insureds, insurers, and producers to increased legal risk and complex litigation, the resolution of which may require significant resources that might be directed better toward the resumption of normal and productive business activity. The situation regarding the payment of insurance proceeds in connection with destruction of the World Trade Center is illustrative. There, more than six years of contentious and costly litigation ensued because, in part, there was uncertainty about the scope and intent of the coverage that was bound. The matter was resolved only after significant intervention and mediation by the Insurance Department.

In the resolution of the World Trade Center matter, the Insurance Department became aware that various widespread practices give rise to transactions the material terms of which, for significant periods after the inception of coverage, can be determined only by reference to extrinsic evidence of circumstances surrounding, and correspondence relating to, the negotiations and drafting of the agreement. That material matters might remain open and render contracts uncertain for months after inception is unwarranted.

Recognizing the potentially harmful effects that can arise from contract uncertainty, in 2004 the United Kingdom's Financial Services Authority ("FSA") called upon industry in the London Market to provide greater certainty at inception of the contract, with full policy documentation promptly thereafter. The London Market was given two years to provide that solution. The Department is given to understand that in the wake of the FSA's directive, significant progress has been made.

This Department, too, expects the industry in New York to adhere to a set of reasoned principles and practices to enhance contract certainty. Accordingly, all terms of a policy should be complete and finalized, memorialized, executed, and provided to the insured before, at, or promptly after inception. For the purposes of this Circular Letter, "promptly" should be generally interpreted to mean within thirty (30) days, and any extensions beyond that period should be carefully documented by insurers. Licensees should strive for contract certainty in at least ninety (90) percent of the policies that are not already subject to a more stringent requirement, such as policy forms subject to approval under the New York Insurance Law and regulations promulgated thereunder.

Insurers and producers doing business in the State of New York should, no more than twelve months after the date of this circular letter, develop and implement practices to assure that policy documentation is delivered to the insured before, at, or promptly after inception. The Department will verify industry's progress toward contract certainty through the examination process, inquiries to licensees, or information obtained from insureds or other parties affected by the transactions.

Any principles and practices established by insurers to ensure contract certainty must comply with all existing statutory or regulatory provisions concerning the content, timing, or delivery of insurance policies.

Please direct any comments or questions regarding the content of this circular letter to:

James Everett
New York State Insurance Department
One Commerce Plaza
Albany, NY 12257
518 408-1593 or email at jeverett@ins.state.ny.us.

Very truly yours,

Eric R. Dinallo