

RECENT FEDERAL DECISION REQUIRES FILING OF SURPLUS LINES INSURANCE FORMS IN FLORIDA

By **Fred E. Karlinsky, Shareholder, and Richard J. Fidei, Partner**
(954) 332-1749, fkarlinsky@cflaw.com (954) 332-1758, rfidei@cflaw.com

A fundamental concept of Florida insurance law appears to have been negated by the United States Court of Appeals for the Eleventh Circuit in a decision which requires surplus lines insurers to file their policy forms for approval by the Florida Office of Insurance Regulation (“OIR”). In *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Company*, 2008 WL 3823898, at *5 (11th Cir. 2008) (hereinafter “CNL Hotels”), the court relied upon the recent Florida Supreme Court decision in *Essex Insurance Company v. Mercedes Zota*, 985 So. 2d 1036 (Fla. 2008) (hereinafter “Essex”), to hold that the forms filing statute, section 627.410(1), *Florida Statutes*, applies to surplus lines insurers. To fully understand the implications of the *CNL Hotels* decision, some background information regarding the regulation of surplus lines insurance is in order.

Traditionally, surplus lines insurance is not subject to some statutory standards, which are generally applicable to all admitted insurance companies in Florida. For example, pursuant to section 627.021(2)(e), *Fla. Stat.*, surplus lines insurance placed in Florida is exempt from certain statutory requirements, which would otherwise apply to surplus lines insurance companies and to the insurance policies which they issue. Therefore, the question always becomes a determination of which specific statutory requirements apply and do not apply to surplus lines carriers.

Section 627.021(2)(e), *Fla. Stat.*, provides that this “chapter does not apply” to surplus lines insurance. A casual reading of this language could lead one to conclude that chapter 627, which provides broad standards and regulation of insurance rates and contracts, does not apply to surplus lines insurance. However, the Florida Supreme Court recently held in *Essex* that such is not the case.

In *Essex*, the Florida Supreme Court was faced with the issue of whether certain statutory provisions found in part II of chapter 627 of the Florida Insurance Code applied to surplus lines insurers. Notably, sections 627.421 and 627.428, *Fla. Stat.*, are codified in part II of chapter 627. Section 627.421, *Fla. Stat.*, sets forth parameters relating to the delivery of insurance policies, while section 627.428, *Fla. Stat.*, provides for the award of attorneys fees under certain circumstances. In *Essex*, the plaintiff argued that these statutes applied to surplus lines carriers and the policies which they issue. In response, the surplus lines insurer contended that these statutes did not apply under section 627.021(2)(e), *Fla. Stat.*, which exempts surplus lines insurance from the provisions in this “chapter.”

Ultimately, in *Essex*, the Court relied upon prior case law and its interpretation of legislative intent, to hold that the exemption provided under section 627.021(2)(e), *Fla.*

Stat., for surplus lines insurers applied only to the statutory provisions set forth in part I of chapter 627, as opposed to the specific provisions set forth in Part II of Chapter 627 which the Plaintiff was seeking to enforce!¹ In doing so, the Court relied upon relevant prior legislative materials, as well as the structure and organization of chapter 627, to reach the conclusion that it was the intention of Legislature for the term “chapter” to only refer to and include, part I of chapter 627. Thus, the Court interpreted the statutory provisions to exempt surplus lines insurers only from complying with the rating laws in Florida, as set forth in part I of chapter 627.²

Notably, chapter 627 of the Florida Insurance Code is separated into twenty-one (21) parts. Each part covers a separate broad subject matter, which includes, but is not limited to: rates and rating organizations (part I); the insurance contract (part II); life insurance and annuity contracts (part III); health insurance policies (part VI); property insurance contracts (part X); motor vehicle and casualty insurance contracts (part XI); and, various other broad subjects. Thus, based upon the decision in *Essex*, it could be argued that surplus lines insurers are only exempt from the provisions set forth in part I. While there may be other statutory exemptions that would apply to surplus lines carriers within select provisions of chapter 627, the Court in *Essex* held that section 627.021(2)(e), *Fla. Stat.* could not be used as a basis for a blanket exemption.

Subsequent to the issuance of the opinion in *Essex*, the OIR provided informal direction that it interpreted Florida law so as to not require surplus lines insurers to file their forms with the OIR, except in very limited situations.³

Within this context, in *CNL Hotels*, the Eleventh Circuit addressed the issue of whether an endorsement to a surplus lines policy —exempting from coverage certain “loss” payments— could be enforced by a surplus lines insurer to deny a claim for \$5.5 million in legal fees paid to class action counsel in a prior matter involving its insured. The Court revisited the issue of the applicability of the provisions codified in part II of chapter 627 to surplus lines insurers, which included section 627.410, *Fla. Stat.*

¹ Thus, this decision discounted the surplus lines insurer’s argument that surplus lines insurance was exempt from all provisions within this “chapter,” which included sections 627.421 and 627.428, *Fla. Stat.*

² Accordingly, certain statutory requirements codified in part II of chapter 627 — specifically relating to the delivery of the policy and right to attorneys fees— do apply to surplus lines carriers.

³ Mr. Ed Domansky, OIR Director of Communications, was quoted in a story in National Underwriter Online News Service that: “The Florida Office of Insurance Regulation does not require surplus lines policy forms to be filed, with just one exception. The existence of this requirement further supports the argument that surplus lines policy forms are not generally subject to OIR review. To our knowledge, surplus lines policy forms are not subject to review in other states either.” See *Nat’l Underwriter Online, Fla. OIR: No Form Mandate for Surplus Lines* (August 18, 2008).

Under section 627.410, *Fla. Stat.*, insurers are required to file their basic insurance policies, annuity contract forms, and application forms with the OIR and obtain its approval. Pursuant to the plain language of the statute, this provision does not have an express exemption applicable to surplus lines insurers. However, OIR has not historically required surplus lines insurers to file their forms, either for informational purposes or for approval.

In *CNL Hotels*, the surplus lines insurer argued that it was exempt from the Florida insurance policy approval process as a surplus lines carrier. Notwithstanding, relying upon the decision in *Essex*, the Eleventh Circuit disagreed. The Eleventh Circuit held that since the form filing requirement is set forth in part II of chapter 627, rather than in part I, the statutory exemption found in section 627.021(2)(e), *Fla. Stat.*, does not apply. As such, the court found under the facts of the case, that approval by the OIR of surplus lines policies was required and remanded the case to the lower court to make a factual determination as to whether the endorsement, which the surplus lines insurer was attempting to enforce, had been filed and approved by the OIR. If it had not been approved, the court stated that the endorsement would be deemed void and unenforceable, which would result in the surplus lines insurer losing the benefit of the exemption from coverage otherwise afforded under the endorsement.

Clearly, the court in *CNL Hotels* did not adopt the OIR's position that forms filings are not required for surplus lines insurers; however, such a holding contravenes long standing practice within the industry —both in Florida and across the United States. The opinion's possible far reaching consequences and the implications with potential applicability of other statutory provisions to surplus lines carriers are dramatic and create a host of issues which need to be carefully considered by all surplus lines insurers in Florida and other jurisdictions.⁴

To date, the OIR has not issued any formal guidance concerning the obligation of surplus lines insurers to file their policy forms for OIR approval. Moreover, the OIR has not issued any guidance as to other statutory standards which may be imposed upon surplus lines carriers based upon the *Essex* and *CNL Hotels* decisions.

However, a request for rehearing was filed by the surplus lines insurer with the court in the *CNL Hotels* case. In connection with that request, OIR filed a Brief of Amicus Curiae in support of the request by the surplus lines carrier for a hearing. In its brief, OIR argued that the Legislature never intended the surplus lines insurer policy form to conform to the same standard as admitted carriers. OIR concluded that surplus lines law does not require form review by OIR and requested that the court vacate its prior decision or certify the case to the Florida Supreme Court for them to decide. In response, the court in *CNL Hotels* denied the surplus lines insurer's request for rehearing.

⁴ It should be noted that *CNL Hotels* is an unreported federal appellate decision which may or may not be adopted as state law by the Florida Supreme Court, should it encounter and consider the issue.

Efforts are underway in the Florida Legislature to consider the impact of these decisions and possibly enact legislation to correct the statutory language which has led to them. Many will endorse appropriate legislative changes to address the issue of the applicability of certain provisions of Florida law to surplus lines insurers. However, the Legislature is not scheduled to convene until its next Regular Legislative Session, which will commence in March, 2009. In the meantime, all affected carriers within the industry must decide on how to proceed and cases may arise regarding the enforceability of surplus lines policies that have already been issued.

In conclusion, the dynamics of the decisions of the Florida Supreme Court in *Essex* and the Eleventh Circuit in *CNL Hotels*, must be seriously considered. For example, surplus lines insurers may face issues related to applicability of certain Florida laws heretofore thought to not apply to them, particularly related to forms filing requirements. As a result, all surplus lines carriers should immediately evaluate the implications of these decisions, consider possible alternatives related to the interpretations of the courts, and take appropriate action to assure that they remain in compliance with Florida law.