

*Client Advisory*

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## Significant changes in Florida Surplus Lines Law

*Dear Friends and Clients:*

We write to advise you of two recent Florida appellate decisions which could have a significant impact on Florida Surplus Lines law. Taken at face value, these decisions would require Surplus Lines Carriers to file policy forms with the Florida Office of Insurance Regulation and expose non-compliant carriers to potentially severe penalties.

In *Essex Insurance Company v. Zota*, 985 So.2d 1036 (2008), the Florida Supreme Court was asked to decide whether Surplus Lines insurers were required to comply with Part II of the Florida Insurance Code, and specifically, section 627.421, Florida Statutes, which requires that insurers promptly issue and deliver evidence of insurance to an insured within sixty (60) days after coverage is placed. Applying longstanding common law principles, the Court ruled that it was appropriate for Surplus Lines insurers to deliver policies to the insured's agent/broker, and that delivery to the actual insured was not required since delivery to the insured's agent/broker, constituted legal delivery of the policy to the insured.

However, the Court then determined, for the first time, that the entirety of Part II of Florida's Insurance Code (except for rate provisions), applied to Surplus Lines insurers. It has long been understood that Surplus Lines carriers were *exempt* from compliance with Part II of Chapter 627. Traditionally, Surplus Lines carriers were not required to file, or have approved, their policy forms and endorsements with the Florida Department of Insurance. The *Essex* Court, however, held to the contrary and laid the groundwork for a subsequent, equally troubling, opinion from the Eleventh Circuit Court of Appeals.

In *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Company*, 2008 WL 3823898 (11<sup>th</sup> Cir. August 18, 2008), the Eleventh Circuit considered a dispute between an insured and its insurer concerning the interpretation and application of an exclusionary endorsement to a Surplus Lines Policy that had not been filed with the Office of Insurance Regulation ("OIR"). In *CNL Hotels*, the Eleventh Circuit held that Surplus Lines insurers are not exempt from the filing and approval process required by section 627.410, Florida Statutes. The Court relied upon *Am. Mut. Fire Ins. Co. v. Illingworth*, 213 So.2d 747 (Fla. 2<sup>nd</sup> DCA 1968), to support its finding that where an

exclusionary endorsement is not filed and approved by the OIR, the endorsement is void and may not be used to deny coverage.

The practical effect of this trio of cases, *Essex*, *CNL*, and *Illingworth*, would seem to require Surplus Lines carriers to file all *basic forms*<sup>1</sup>, endorsements, exclusions, etc. with the OIR, and have those forms approved, before they may be properly issued to Florida insureds. In the event that any basic policy form has not been approved by the OIR, then the form could be deemed void, and therefore inapplicable, at least under a plain reading of these three cases.

We have been following up on these developments with the Florida Insurance Commissioner and the OIR, as well as the Florida Surplus Lines Service Office in order to establish their view on these issues.

*For additional information on these issues, please contact Jim Kaplan or Mike Sastre.*

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<sup>1</sup> Section 627.410 has a limited exception to the filing and approval requirement which applies to “policies, riders, endorsements, and forms of unique character designed for and used with relation to insurance upon a particular risk”. The terms “unique character” and “particular risk” have not been defined by statute, but the two cases addressing the terms have indicated that they are not to be construed liberally.