

## 2011 DRAFTING REQUEST

### Bill

Received: **06/15/2011**

Received By: **pkahler**

Wanted: **Soon**

Companion to LRB:

For: **Insurance**

By/Representing: **Jim Guidry**

May Contact:

Drafter: **pkahler**

Subject: **Insurance - miscellaneous**

Addl. Drafters: **tdodge**

Extra Copies:

Submit via email: **YES**

Requester's email: **Jim.Guidry@wisconsin.gov**

Carbon copy (CC:) to: **Tamara.Dodge@legis.wisconsin.gov**

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### Pre Topic:

No specific pre topic given

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### Topic:

Surplus lines changes

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### Instructions:

See attached

*See attached*

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### Drafting History:

| <u>Vers.</u> | <u>Drafted</u>                                | <u>Reviewed</u>        | <u>Typed</u>           | <u>Proofed</u> | <u>Submitted</u>      | <u>Jacketed</u> | <u>Required</u> |
|--------------|---|------------------------|------------------------|----------------|-----------------------|-----------------|-----------------|
| /?           | pkahler<br>06/22/2011<br>tdodge<br>07/07/2011 | kfollett<br>07/25/2011 |                        | _____          |                       |                 | State           |
| /P1          |   |                        | phenry<br>07/25/2011   | _____          | mbarman<br>07/25/2011 |                 | State           |
| /P2          | pkahler<br>08/23/2011                         | kfollett<br>09/08/2011 | rschluet<br>09/08/2011 | _____          | ggodwin<br>09/08/2011 |                 | State           |

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|              | tdodge<br>09/06/2011  |                        |                        | _____          |                       |                       |                 |
| /1           | pkahler<br>09/12/2011 | kfollett<br>09/23/2011 | rschluet<br>09/26/2011 | _____          | mbarman<br>09/26/2011 |                       | State           |
| /2           | pkahler<br>10/11/2011 | kfollett<br>10/13/2011 | jfrantze<br>10/14/2011 | _____          | mbarman<br>10/14/2011 | ggodwin<br>01/10/2012 |                 |

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↳ At  
Intro.

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*[Handwritten signatures and initials: "CF", "9/23", "RS", "JF"]*

Vers.      Drafted      Reviewed      Typed      Proofed      Submitted      Jacketed      Required

tdodge  
09/06/2011

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| /P1          |   |   | phenry<br>07/25/2011<br><i>[Signature]</i> | _____          | mbarman<br>07/25/2011 |                 |                 |

FE Sent For: *asll* *JF*

*js*

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*1 Pllgf  
7/25  
7/25 — ph/yr  
ph*

FE Sent For:

<END>

**Kahler, Pam**

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**From:** Guidry, Jim R - OCI [Jim.Guidry@wisconsin.gov]

**Sent:** Monday, June 13, 2011 11:55 AM

**To:** Kahler, Pam

**Subject:** OCI tech bill #2

**Attachments:** Technical bill 2 draft changes draft 61011.doc; Surplus Lines Changes Memo 2011 06 10.doc  
Pam,

Attached is a second piece of legislation we are working on along with a memo that should help provide some additional background for you. This bill does not have the time. I understand that Fred has spoken with you regarding this.

As always, let me know if you have any questions.

Thanks!

Jim Guidry  
Legislative Liaison/Public Information Officer  
Office of the Commissioner of Insurance  
(608) 264-6239 Work  
(608) 209-6309 Mobile

**Proposed Statutory Changes to address Gillen and implement NRRRA**

**Gillen Fix:** Note that this revision is regarded as a clarification, not a change in law, to address the incorrect application of the provisions by the Gillen court.

**Create s. 631.20 (7):**

631.20 (7) This section does not apply to a surplus lines form issued under s. 618.41 either before or after the effective date of this Act.

*exception  
631.20(1)(c)9.*

**Amend s. 631.85:**

631.85 Appraisal or arbitration. An insurance policy may contain provision for independent appraisal and compulsory arbitration, subject to the provisions of s. 631.20. If an approved policy provides for application to a court of record for the appointment of a disinterested appraiser, arbitrator or umpire, any court of record of this state except the court of appeals or the supreme court may be requested to make an appointment. Upon appropriate request, the court shall make the appointment promptly. This section does not apply to a surplus lines form issued under s. 618.41, including a surplus lines form issued prior to the effective date of this Act (legislative reference bureau inserts date).

*am  
631.01(3)  
?  
to ocean marine  
always  
surplus  
lines?  
& don't date  
oo.*

**Changes to Chapter 618 - Surplus Lines**

**Renumber s. 618.39 as 618.38 (into subchapter II)**

**Create s. 618.39 (in subch. III)**

~~618.38~~ <sup>618.40</sup> Definitions: For the purposes of this subchapter, unless the context indicates otherwise:

(1) "Affiliate" means, with respect to an insured, any person that controls, is controlled by, or is under common control with the insured.

(2) "Affiliated group" means any group of persons that are all affiliated.

*#. CR; 618.40*

**(3)** "Authorized insurer" means an insurer that is licensed, or authorized, to transact the business of insurance under the law of the home state.

**(4)** "Control" means a person:

(a) Directly or indirectly, or acting through one or more other persons, owns, controls, or has the power to vote 25 percent or more of any class of voting securities of a person, or.

(b) Controls in any manner the election of a majority of the directors or trustees of a person.

**(5)** (a) Except as provided in par. (b), "home state" means, with respect to an insured: *→, any of the following*

1. The state in which an insured maintains its principal place of business or, in the case of an individual, the individual's principal residence; or.

2. If 100 percent of the insured risk is located out of the state referred to in par. (a), the state to which the greatest percentage of the insured's taxable premium for that insurance contract is allocated.

(b) If more than one insured from an affiliated group are named insureds on a single surplus lines insurance contract, "home state" means the state, as determined pursuant to par. (a), of the member of the affiliated group that has the largest percentage of premium attributed to it under such insurance contract.

**(6)** "Multi-state risk" means a risk covered by an unauthorized insurer with insured exposures in more than one state.

**(7)** "Unauthorized insurance" means any insurance permitted in a state to be placed directly or through a surplus lines broker with an unauthorized insurer eligible to accept such insurance.

**(8)** "Premium tax" means, with respect to unauthorized insurance, any tax, fee, assessment, or other charge imposed by this state directly or indirectly based on any payment made as consideration for an insurance contract for such insurance, including premium deposits, assessments, registration fees, and any other compensation given in consideration for a contract of insurance.

**(9)** "Principal place of business" means, with respect to determining the home state of the insured, the state where the insured maintains its headquarters and where the insured's high-level

officers direct, control and coordinate the business activities of the insured.

(10) "Principal residence" means, with respect to determining the home state of the individual, the state where the individual resides for the greatest number of days during a calendar year.

(11) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands, and American Samoa.

(12) "Surplus lines broker" means a person which is licensed in a state to sell, solicit, or negotiate insurance on properties, risks, or exposures located or to be performed in that state with unauthorized insurers.

(13) "Surplus lines insurance" means any insurance where this state is the home state of the insured and the insurance is permitted under this subchapter to be placed through a surplus lines agent or broker with an unauthorized insurer eligible to accept such insurance.

**Amend s. 618.41 (8) (a) (intro.) and (c) and (9):**

618.41 (8)(a) *Responsibility.* An agent or broker may not place insurance under this section with, or any other and a person who offers liability insurance coverage under a group policy, may not place insurance under this section with, or solicit the purchase of coverage under a group policy issued by, an unauthorized insurer if all of the following exist:

(c) *Financially sound.* To be financially sound for purposes of par. (a) 1., an insurer must be able to satisfy standards comparable to those applied under the laws of this state to authorized insurers or those under s. 618.416.

(9) REQUIREMENTS FOR SURPLUS LINES POLICIES. (a) *Required information.* Every new or renewal insurance policy procured and delivered under this section shall bear the name and address of the insurance agent or broker who procured it and, ~~except for ocean marine insurance,~~ shall have stamped or affixed upon it the following: "This insurance contract is with an insurer which has not obtained a certificate of authority to transact a regular insurance business in the state of Wisconsin, and is issued and delivered as a surplus line coverage pursuant to s. 618.41 of the Wisconsin Statutes. Section 618.43 (1), Wisconsin Statutes, requires payment by the policyholder of 3 percent tax on gross premium." ~~Every ocean marine insurance policy shall have~~

~~stamped or affixed upon it the above statement except that the tax shall be one-half of one percent on gross premium.~~

~~Create s. 618.416:~~

(E)

(B) ← 618.416 Qualification for placement of surplus lines insurance with an unauthorized insurer. When this state is the home state of the insured, an intermediary may not place surplus lines insurance under s. 618.41 with an unauthorized insurer unless at the time of placement, the unauthorized insurer:

- (1) Complies with the all of the following if the unauthorized insurer is domiciled in a United States jurisdiction:
  - (a) The unauthorized insurer is authorized to write the type of insurance placed in its domiciliary jurisdiction.
  - (b) The unauthorized insurer either has capital and surplus or its equivalent under the laws of its domiciliary jurisdiction that equals the greater of either the minimum capital and surplus requirements under the laws of this state or \$15 million or the commissioner affirmatively finds that the unauthorized insurer's capital and surplus are acceptable. The commissioner's finding shall be based upon factors that include quality of management, capital and surplus of any parent company, company underwriting profit and investment income trends, market availability and company record and reputation within the industry. In no event shall the commissioner make an affirmative finding of acceptability when the unauthorized insurer's capital and surplus is less than \$4.5 million.
  - (c) The unauthorized insurer provides to the commissioner no more than six months after the close of the period reported upon a certified copy of its current annual statement that is filed and approved by the regulatory authority in the domicile of the unauthorized insurer and certified by an accounting or auditing firm licensed in the jurisdiction of the insurer's domicile.
- (2) As to an alien unauthorized insurer, the insurer is listed on the quarterly listing of alien insurers maintained by the international insurers department of the national association of insurance commissioners and meets additional

requirements regarding the use of the list established by rule of the commissioner.

**Amend s. 618.43 (1) (a) (intro), 1, 2 and 3 :**

618.43 Taxation of insurance written by unauthorized insurers. (1) BUSINESS SUBJECT TO TAXATION. (a) ~~Except as provided in par. (b), insurers~~ Insurers, agents, brokers and policyholders are liable, as provided in sub. (2), for a premium tax of 3% of gross premiums charged for insurance, excluding annuities, if any of the following are satisfied:

1. The insurance is transacted under s. 618.41 (1) or 618.42 except after July 20, 2011, the tax is applicable only if the home state of the insured is Wisconsin.

2. The insurance is transacted by an unauthorized insurer which is a risk retention group except after July 20, 2011, the tax is applicable only if the home state of the insured is Wisconsin.

3. The insurance is transacted by an unauthorized insurer for a risk purchasing group ~~for coverage of risks which reside or are otherwise located in this state,~~ except after July 20, 2011, the tax is applicable only if the home state of the insured is Wisconsin.

**Repeal s. 618.43 (1) (b)**

**Amend s. 618.43 (6):**

618.43 (6) ALLOCATION OF TAX. If For transactions occurring prior to July 21, 2011 if a policy covers risks that are only partially located in this state, the premium shall be reasonably allocated among the states on the basis of risk locations in computing the tax, except that all premiums received in this state or charged on policies written or negotiated in this state shall be taxable in full under this section, with a credit for any tax actually paid in another state to the extent of a reasonable allocation on the basis of risk locations.

**Create s. 618.43 (9) and 618.435:**

618.43 (9) SURPLUS LINE AND DIRECTLY PROCURED INSURANCE TAXATION. Notwithstanding any other provision of this section, the 3% tax on premiums imposed by this section on insurance written by unauthorized insurers under ss. 618.41 and 618.42 shall be levied upon and only upon the entire gross premium, including premium attributable to those portions of the risk located outside of this state, for surplus lines insurance policies issued on or after July 21, 2011, for which the home state of the insured is this state.



618.435 Application of Wisconsin Law. The placement of insurance under ss. 618.41 and 618.42 shall be subject to the requirements of this subchapter only when the insured's home state is this state.

**Changes to Chapter 628 - Surplus Lines Agent/Broker Licensing and certificate of insurance**

**Create s. 628.03 (1p):**

628.03 (1p) NON-WISCONSIN SURPLUS LINES EXEMPTION. Sub. (1) does not apply to a person who solely procures unauthorized insurance as defined in s. 618.38 (7) that is not surplus lines insurance as defined under s. 618.38 (13).

**Amend s. 628.34 (1) to add a specific prohibition of misleading certificates of insurance:**

628.34 (1) (a) *Conduct forbidden.* No person who is or should be licensed under chs. 600 to 646, no employee or agent of any such person, no person whose primary interest is as a competitor of a person licensed under chs. 600 to 646, and no person on behalf of any of the foregoing persons may make or cause to be made any communication relating to an insurance contract, the insurance business, any insurer or any intermediary which contains false or misleading information, including information misleading because of incompleteness. Filing a report and, with intent to deceive a person examining it, making a false entry in a record or willfully refraining from making a proper entry, are "communications" within the meaning of this paragraph. No intermediary or insurer may use any business name, slogan, emblem or related device that is misleading or likely to cause the intermediary or insurer to be mistaken for another insurer or intermediary already in business. No intermediary may provide a misleading certificate of insurance.

PJK

TJD

**Proposed Statutory Changes to ch. 646:**

**Retained Asset Fix:** The suggested changes below add a definition for "retained asset account" ("RAA") in s 646.03; modify s. 646.31, the coverage section, to make it clear that RAAs are covered; include RAAs in s. 646.35, the continuation of coverage section; and slightly modify s. 646.01(2)(b), the purposes section, to match the definition of RAA that is being added to s. 646.03.

**Amend s. 646.01(2)(b):**

646.01 (2) (b) To provide where appropriate for the continuation of protection under policies and ~~supplemental~~ supplementary contracts of life insurance, disability insurance and annuities.

**Create s. 646.03 (4m) to add a definition of retained asset account**

646.03 (4m) "Retained asset account" means any mechanism whereby the settlement of proceeds payable under a life insurance policy is accomplished by the insurer or an entity acting on behalf of the insurer depositing the proceeds into an account with check or draft writing privileges, where those proceeds are retained by the insurer, pursuant to a written supplementary contract not involving annuity benefits.

**Amend s. 646.31(1) to clarify coverage of RAAs:**

646.31 (1) CONDITIONS OF ELIGIBILITY. A claim is not eligible for payment from the fund unless it is an unpaid claim for a loss insured under the policy or annuity, or an unpaid claim under a supplementary contract providing for a retained asset account, and all of the following conditions are met:

**Amend s. 646.31 (4) (a) to increase maximum limits for certain lines and clarify how multiple policies are treated for that purpose:**

646.31 (4) MAXIMUM CLAIM. <sup>(ap)</sup> (a) Except in regard to worker's compensation insurance and except as provided in par. (b), the obligation of the fund on a single risk, loss or life, regardless of the number of policies or contracts, may not exceed \$300,000 except the aggregate liability of the fund for a single risk, loss or life with respect to benefits for property insurance, liability insurance and disability insurance, regardless of the number of such policies, shall not exceed \$500,000.

**Create s. 646.31 (4) (c):**

646.31 (4) <sup>(ag)</sup> (c) For purposes of this subsection only, "disability insurance" means comprehensive health insurance policies and major medical health insurance policies. Disability insurance does not include hospital indemnity, loss of time, accidental benefits, limited or specified benefit or other ancillary coverages; disability income insurance coverage; long-term care insurance

coverage; insurance coverage that is supplemental to another insurance policy or program, such as medicare supplement insurance; or similar types of policies.

**Amend. 646.35 (1) (b) to clarify that RAAs are subject to continuation of coverage:**

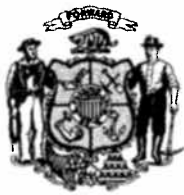
646.35 (1) (b) Life insurance and supplementary contracts providing for retained asset accounts.

**Fix to clarify the conflict between ss. 646.31(1)(cm) and 646.35(6).**

Section 646.31(1)(cm), termination of coverage, provides that, except for life, noncancelable or guaranteed renewable disability and annuities, the claim must occur within 30 days after the date of liquidation in order to be a covered claim. However, s. 646.35(6)(b) provides that the WISF does not have to continue disability policies that are neither noncancelable nor guaranteed renewable after the time required in s. 645.43, which is 15 days but that it may continue them up to 180 days after the date of the liquidation order. The 30 days given for a covered claim under a cancelable disability policy under s. 646.31(1)(cm) should be carried over to s. 646.35(6)(b).

**Amend 646.35(6)(b):**

646.35 (6) (b) In the case of a disability insurance policy that is neither guaranteed renewable nor noncancelable, the fund is not obligated to continue the policy in force beyond ~~the time required under s. 645.43~~ 30 days after the date the order of liquidation is entered or the date established in the liquidation order of another state, but may continue the coverage under any disability insurance policy for up to 180 days after the date of the liquidation order.



In: 7/7/11

Other

gf

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

J-vote

gen cut

insurance security funds

1 AN ACT <sup>gen cut</sup>; relating to: surplus lines insurance and granting rule-making  
2 authority.

***Analysis by the Legislative Reference Bureau***

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

3 SECTION 1. Subchapter III (title) of chapter 618 [precedes 618.39] of the  
4 statutes is repealed.

5 SECTION 2. Subchapter III (title) of chapter 618 [precedes 618.40] of the  
6 statutes is created to read:

7  
8 CHAPTER 618

SUBCHAPTER III

PERMISSIBLE BUSINESS BY  
UNAUTHORIZED INSURERS

SECTION 3. 618.40 of the statutes is created to read:

618.40 Definitions. In this subchapter, unless the context requires otherwise:

(1) "Affiliate" means, with respect to an insured, any person that controls, is controlled by, or is under common control with, the insured.

\*\*\*NOTE: The term "affiliate" is not used in ch. 618 or in these new provisions.

(2) "Affiliated group" means any group of persons that are all affiliated.

\*\*\*NOTE: I don't think this definition accomplishes anything, since "affiliated" is not defined. It would mean something if, instead, it read "any group of persons that are all affiliates," because then it would contain the defined term, "affiliate."

\*\*\*NOTE: This term is not used in ch. 618 and is used in these new provisions only in the definition of "home state." Is there some way to include the salient terms from the definition of "affiliate" in this definition and then get rid of the definition for "affiliate"?

(3) "Authorized insurer" means an insurer that is licensed, or authorized, to transact the business of insurance under the law of the home state.

\*\*\*NOTE: "Unauthorized insurer" is used much more than "authorized insurer." Can a definition for "unauthorized insurer" be added, such as "an insurer that is not licensed, etc., to transact the business of insurance under the law of the home state" or "an insurer that is not an authorized insurer"?

(4) "Control" means, with respect to a person having control over another person, that the person does any of the following:

(a) Directly or indirectly, or acting through one or more other persons, owns, controls, or has the power to vote 25 percent or more of any class of voting securities of a person.

(b) Controls in any manner the election of a majority of the directors or trustees of a person.

(5) (a) Except as provided in par. (b), "home state" means, with respect to an insured, one of the following:

1           1. The state in which the insured maintains its principal place of business or,  
2           in the case of an insured who is an individual, the individual's principal residence.

3           2. If 100 percent of the insured risk is located outside of the state referred to  
4           in subd. 1., the state to which the greatest percentage of the insured's taxable  
5           premium for that insurance contract is allocated.

6           (b) If more than one insured from an affiliated group are named insureds on  
7           a single surplus lines insurance contract, "home state" means the state, as  
8           determined under par. (a), of the member of the affiliated group that has the largest  
9           percentage of premium attributed to it under the insurance contract.

*in any form* ← **\*\*\*NOTE:** I did not include the definition for "multistate risk" because the term is  
not used in ch. 618 or in these new provisions.

10          **(6)** "Premium tax" means, with respect to unauthorized insurance, any tax, fee,  
11          assessment, or other charge imposed by this state directly or indirectly based on any  
12          payment made as consideration for an insurance contract for such insurance,  
13          including premium deposits, assessments, registration fees, and any other  
14          compensation given in consideration for a contract of insurance.

15          **(7)** "Principal place of business" means, with respect to determining the home  
16          state of an insured, the state where the insured maintains its headquarters and  
17          where the insured's high-level officers direct, control, and coordinate the business  
18          activities of the insured.

19          **(8)** "Principal residence" means, with respect to determining the home state of  
20          an insured who is an individual, the state where the individual resides for the  
21          greatest number of days during a calendar year.

**SECTION 3**

1           (9) "State" includes any state of the United States, the District of Columbia,  
2 the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the Virgin  
3 Islands, and American Samoa.

4           (10) "Surplus lines broker" means a person that is licensed in a state to sell,  
5 solicit, or negotiate insurance on properties, risks, or exposures located or to be  
6 performed in that state with unauthorized insurers.

7           (11) "Surplus lines insurance" means any insurance to which all of the  
8 following apply:

9           (a) This state is the home state of the insured.

10           (b) The insurance is permitted under this subchapter to be placed through a  
11 surplus lines agent or broker with an unauthorized insurer eligible to accept the  
12 insurance.

13           (12) "Unauthorized insurance" means any insurance permitted in a state to be  
14 placed directly or through a surplus lines broker with an unauthorized insurer  
15 eligible to accept such insurance.

16           **SECTION 4.** 618.405 of the statutes is created to read:

17           **618.405 Application of Wisconsin law.** The placement of insurance under  
18 ss. 618.41 and 618.42 is subject to the requirements of this subchapter only when the  
19 insured's home state is this state.

20           **SECTION 5.** 618.41 (8) (a) (intro.) of the statutes is amended to read:

21           618.41 (8) (a) *Responsibility.* (intro.) An agent or broker, ~~or any other person~~  
22 ~~who offers liability insurance coverage under a group policy,~~ may not place insurance  
23 ~~under this section with, or~~ and a person who offers liability insurance coverage under

1 a group policy may not solicit the purchase of coverage under a group policy issued  
2 by, an unauthorized insurer if all of the following exist:

History: 1971 c. 260; 1975 c. 371 ss. 45, 50; 1979 c. 89; 1979 c. 102 ss. 147, 236 (6), (13), (21), 237; 1981 c. 20 s. 2202 (26) (a); 1985 a. 29, 332; 1987 a. 247; 1989 a. 187 s. 29; 2009 a. 177.

3 **SECTION 6.** 618.41 (8) (c) of the statutes is amended to read:

4 618.41 (8) (c) *Financially sound.* To be financially sound for purposes of par.  
5 (a) 1., an insurer must be able to satisfy standards comparable to those applied under  
6 the laws of this state to authorized insurers or the standards under s. 618.416.

History: 1971 c. 260; 1975 c. 371 ss. 45, 50; 1979 c. 89; 1979 c. 102 ss. 147, 236 (6), (13), (21), 237; 1981 c. 20 s. 2202 (26) (a); 1985 a. 29, 332; 1987 a. 247; 1989 a. 187 s. 29; 2009 a. 177.

\*\*\*\*NOTE: I assumed that the insurer had to satisfy the standards under s. 618.416  
and not standards *comparable to* those standards, correct?

7 **SECTION 7.** 618.41 (9) (a) of the statutes is amended to read:

8 618.41 (9) (a) *Required information.* Every new or renewal insurance policy  
9 procured and delivered under this section shall bear the name and address of the  
10 insurance agent or broker who procured it and, ~~except for ocean marine insurance,~~  
11 shall have stamped or affixed upon it the following: "This insurance contract is with  
12 an insurer which has not obtained a certificate of authority to transact a regular  
13 insurance business in the state of Wisconsin, and is issued and delivered as a surplus  
14 line coverage pursuant to s. 618.41 of the Wisconsin Statutes. Section 618.43 (1),  
15 Wisconsin Statutes, requires payment by the policyholder of 3 percent tax on gross  
16 premium." ~~Every ocean marine insurance policy shall have stamped or affixed upon~~  
17 ~~it the above statement except that the tax shall be one-half of one percent on gross~~  
18 ~~premium.~~

History: 1971 c. 260; 1975 c. 371 ss. 45, 50; 1979 c. 89; 1979 c. 102 ss. 147, 236 (6), (13), (21), 237; 1981 c. 20 s. 2202 (26) (a); 1985 a. 29, 332; 1987 a. 247; 1989 a. 187 s. 29; 2009 a. 177.

19 **SECTION 8.** 618.416 of the statutes is created to read:

20 **618.416 Qualification for placement of surplus lines insurance with an**  
21 **unauthorized insurer.** An intermediary may not place surplus lines insurance  
22 under s. 618.41 with an unauthorized insurer if this state is the home state of the



UP: (already changed)

1 <sup>insured, ←</sup> unauthorized insurer unless at the time of placement <sup>e</sup> all of the following apply to  
2 the unauthorized insurer:

\*\*\*\*NOTE: Should this read "proposed insured"? If there is already an insured, I assume the insurance has already been placed.

3 (1) If the unauthorized insurer is domiciled in a United States jurisdiction, the  
4 insurer satisfies all of the following:

5 (a) In its domiciliary jurisdiction, the unauthorized insurer is authorized to  
6 write the type of insurance to be placed with the insurer.

7 (b) Either the unauthorized insurer has capital and surplus or its equivalent  
8 under the laws of its domiciliary jurisdiction that equals the greater of either the  
9 minimum capital and surplus requirements under the laws of this state or \$15 <sup>000,000</sup>  
10 million or the commissioner affirmatively finds that the unauthorized insurer's  
11 capital and surplus are acceptable. The commissioner's finding shall be based on  
12 factors that include quality of management, capital and surplus of any parent  
13 company, company underwriting profit and investment income trends, market  
14 availability, and company record and reputation within the industry. In no event  
15 may the commissioner find that the unauthorized insurer's capital and surplus are  
16 acceptable if the unauthorized insurer's capital and surplus are less than \$4,5 <sup>000,000</sup>  
17 million.

18 (c) The unauthorized insurer provides to the commissioner, no more than 6  
19 months after the close of the period reported on, a certified copy of its current annual  
20 statement that is filed and approved by the regulatory authority in the unauthorized  
21 insurer's domicile and certified by an accounting or auditing firm licensed in the  
22 jurisdiction of the unauthorized insurer's domicile.

1 (2) If the unauthorized insurer is an alien insurer, the insurer is listed on the  
2 quarterly listing of alien insurers maintained by the international insurers  
3 department of the National Association of Insurance Commissioners and meets  
4 additional requirements regarding the use of the list established by rule of the  
5 commissioner.

6 SECTION 9. 618.43 (1) (a) (intro.) of the statutes is amended to read:

7 618.43 (1) (a) (intro.) ~~Except as provided in~~ Subject to par. (b) (bc), insurers,  
8 agents, brokers, and policyholders are liable, as provided in sub. (2), for a premium  
9 tax of ~~3%~~ 3 percent of gross premiums charged for insurance, excluding annuities,  
10 if any of the following ~~are~~ is satisfied:

11 History: 1971 c. 260; 1975 c. 371 s. 50; 1979 c. 102 ss. 148, 237; 1987 a. 247; 2001 a. 65.

11 SECTION 10. 618.43 (1) (a) 3. of the statutes is amended to read:

12 618.43 (1) (a) 3. The insurance is transacted by an unauthorized insurer for a  
13 risk purchasing group ~~for coverage of risks which reside or are otherwise located in~~  
14 ~~this state.~~

15 History: 1971 c. 260; 1975 c. 371 s. 50; 1979 c. 102 ss. 148, 237; 1987 a. 247; 2001 a. 65.

15 SECTION 11. 618.43 (1) (b) of the statutes is repealed.

16 SECTION 12. 618.43 (1) (bc) of the statutes is created to read:

17 618.43 (1) (bc) Notwithstanding any other provision of this section, with  
18 respect to premiums charged on or after July 21, 2011, for insurance to which par.  
19 (a) applies, the tax under par. (a) is required only if the home state of the insured is  
20 this state, and it shall be levied on the entire gross premium charged, including  
21 premium attributable to those portions of the risk located outside of this state.

\*\*\*NOTE: Is it correct that the date relates to when premiums are charged? If the  
date should relate to when a policy is issued, should it also relate to when a policy is  
renewed?

22 SECTION 13. 618.43 (1) (d) of the statutes is amended to read:

1           618.43 (1) (d) Any insurance business transacted in violation of the law is  
2 subject to a premium tax of 5% 5 percent of gross premiums charged for the  
3 insurance, ~~except that for ocean marine insurance the tax is 2% of gross premiums~~  
4 ~~charged for the insurance.~~

History: 1971 c. 260; 1975 c. 371 s. 50; 1979 c. 102 ss. 148, 237; 1987 a. 247; 2001 a. 65.

\*\*\*\*NOTE: I assumed you would want the penalty tax rate to be the same for ocean marine insurance, too; otherwise the penalty rate would be less than the regular rate.

5           **SECTION 13.** 618.43 (6) of the statutes is amended to read:

6           618.43 (6) ALLOCATION OF TAX. If With respect to gross premiums charged before  
7 July 21, 2011, if a policy covers risks that are only partially located in this state, the  
8 premium shall be reasonably allocated among the states on the basis of risk locations  
9 in computing the tax, except that all premiums received in this state or charged on  
10 policies written or negotiated in this state shall be taxable in full under this section,  
11 with a credit for any tax actually paid in another state to the extent of a reasonable  
12 allocation on the basis of risk locations.

History: 1971 c. 260; 1975 c. 371 s. 50; 1979 c. 102 ss. 148, 237; 1987 a. 247; 2001 a. 65.

\*\*\*\*NOTE: Is the application to "gross premiums charged" before the specified date correct? "Transactions occurring" before that date seems too vague.

13           **SECTION 14.** 628.03 (1) of the statutes is amended to read:

14           628.03 (1) GENERAL. No natural person may perform, offer to perform, or  
15 advertise any service as an intermediary in this state, unless the natural person  
16 obtains a license under s. 628.04 or 628.09, and no person may utilize the services  
17 of another as an intermediary if the person knows or should know that the other does  
18 not have a license as required by law. The licensing requirements of this subsection  
19 does not apply to a person who solely procures unauthorized insurance, as defined  
20 in s. 618.40 (12), that is not surplus lines insurance, as defined in s. 618.40 (11).

History: 1975 c. 371, 421; 1981 c. 38; 1987 a. 247.

21           **SECTION 15.** 628.05 (1) of the statutes is amended to read:

1           628.05 (1) GENERAL EXEMPTION. Except as otherwise provided in sub. (2), or by  
2 rule promulgated by the commissioner, persons engaged in soliciting insurance  
3 exclusively for town mutuals are not subject to the licensing requirements of s.  
4 628.03 (1).

History: 1975 c. 371, 421.

5           **SECTION 16.** 628.34 (1) (a) of the statutes is amended to read:

6           628.34 (1) (a) *Conduct forbidden.* No person who is or should be licensed under  
7 chs. 600 to 646, no employee or agent of any such person, no person whose primary  
8 interest is as a competitor of a person licensed under chs. 600 to 646, and no person  
9 on behalf of any of the foregoing persons may make or cause to be made any  
10 communication relating to an insurance contract, the insurance business, any  
11 insurer, or any intermediary ~~which~~ that contains false or misleading information,  
12 including information that is misleading because of incompleteness. Filing a report  
13 and, with intent to deceive a person examining it, making a false entry in a record  
14 or willfully refraining from making a proper entry, are “communications” within the  
15 meaning of this paragraph. No intermediary or insurer may use any business name,  
16 slogan, emblem, or related device that is misleading or likely to cause the  
17 intermediary or insurer to be mistaken for another insurer or intermediary already  
18 in business. No intermediary may provide a misleading certificate of insurance.

History: 1975 c. 371, 421; 1979 c. 89, 109, 313, 355; 1991 a. 279; 1995 a. 289; 1997 a. 27, 237; 2009 a. 275.

19           **SECTION 17.** 631.20 (7) of the statutes is created to read:

20           631.20 (7) SURPLUS LINES INSURANCE. Except as provided in sub. (1) (c) 9. and  
21 s. 618.41 (6m), this section does not apply to a surplus lines insurance form issued  
22 under s. 618.41 before, on, or after the effective date of this subsection .... [LRB  
23 inserts date].

\*\*\*\*NOTE: Is the exception correct? I'm puzzled by the placement of s. 618.41 (6m).

→ From the language, it's not clear what ruste proofing warranty insurance has to do with

**SECTION 18**

X surplus lines insurance. Is s. 618.41 (6m) supposed to be limited to rustproofing warranty insurance that is surplus lines insurance?

Provisions

**SECTION 19.** 631.85 of the statutes is amended to read:

**631.85 Appraisal or arbitration.** An insurance policy may contain ~~provision~~

for independent appraisal and compulsory arbitration, subject to the provisions of s. 631.20. If an approved policy provides for application to a court of record for the appointment of a disinterested appraiser, arbitrator, or umpire, any court of record of this state except the court of appeals or the supreme court may be requested to make an appointment. Upon appropriate request, the court shall make the appointment promptly. This section does not apply to a surplus lines insurance form issued under s. 618.41 before, on, or after the effective date of this section .... [LRB inserts date].

History: 1975 c. 375; 1977 c. 187.

**SECTION 20. Initial applicability.**

(1) OCEAN MARINE INSURANCE TAX RATE. The treatment of sections 618.41 (9) (a) and 618.43 (1) (a) (intro.) (with respect to the tax rate exception for ocean marine insurance), (b), and (d) of the statutes first applies to surplus lines ocean marine insurance issued or renewed on the effective date of this subsection.

\*\*\*\*NOTE: Is this initial applicability for the ocean marine insurance tax rate change ok?

(END)

Insert 10-11-TJD

D-note

2011-2012 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-2242/P1insTD  
TJD:.....

1 INSERT 10-11-TSD

2 SECTION 1. 646.01 (2) (b) of the statutes is amended to read:

3 646.01 (2) (b) To provide where appropriate for the continuation of protection  
4 under policies and ~~supplemental~~ supplementary contracts of life insurance,  
5 disability insurance and annuities.

History: 1971 c. 260; 1975 c. 373, 374, 422; 1979 c. 102, 109, 355; 1981 c. 20 s. 2202 (26) (c); 1983 a. 120; 1985 a. 216; 1987 a. 247, 325; 1989 a. 23; 1995 a. 27 s. 9130 (4); 1995 a. 236, 396; 1997 a. 35; 2003 a. 261; 2007 a. 20 s. 9121 (6) (a); 2007 a. 170; 2009 a. 342.

6 SECTION 2. 646.03 (4m) of the statutes is created to read:

7 646.03 (4m) "Retained asset account" means any mechanism in which the  
8 settlement of proceeds payable under a life insurance policy is accomplished by the  
9 insurer or an entity acting on behalf of the insurer depositing the proceeds into an  
10 account with check or draft writing privileges, where those proceeds are retained by  
11 the insurer, under a written supplementary contract not involving annuity benefits.

CPS:  
Soft

12 SECTION 3. 646.31 (1) (intro.) of the statutes is amended to read:

13 646.31 (1) CONDITIONS OF ELIGIBILITY. (intro.) A claim is not eligible for payment  
14 from the fund unless it is an unpaid claim for a loss insured under the policy or  
15 annuity, or an unpaid claim under a supplementary contract providing for a retained  
16 asset account, and all of the following conditions are met:

History: 1979 c. 109; 1983 a. 120 ss. 6 to 11, 19; 1985 a. 216; 1987 a. 325; 1989 a. 23, 31; 1995 a. 396; 1997 a. 237; 1999 a. 30; 2003 a. 261; 2005 a. 253; 2007 a. 170; 2009 a. 342.

17 SECTION 4. 646.31 (4) (ag) of the statutes is created to read:

18 646.31 (4) (ag) For purposes of this subsection, "disability insurance" means  
19 comprehensive health insurance policies and major medical health insurance  
20 policies. "Disability insurance" does not include hospital indemnity; loss of time;  
21 accidental benefits; limited or specified benefit or other ancillary coverages;  
22 disability income insurance coverage; long-term care insurance coverage; insurance

move

1 coverage that is supplemental to another insurance policy or program, including  
2 Medicare supplement insurance; or similar types of policies.

3 **SECTION 5.** 646.31 (4) (a) of the statutes is renumbered 646.31 (4) (ap) and  
4 amended to read:

5 646.31 (4) (ap) Except in regard to worker's compensation insurance and  
6 except as provided in par. (b), the obligation of the fund on a single risk, loss, or life,  
7 regardless of the number of policies or contracts, may not exceed \$300,000,  
8 regardless of the number of policies or contracts except that the aggregate liability  
9 of the fund for a single risk, loss, or life with respect to benefits for property  
10 insurance, liability insurance, and disability insurance, regardless of the number of  
11 those policies, may not exceed \$500,000.

Move  
Section  
4

History: 1979 c. 109; 1983 a. 120 ss. 6 to 11, 19; 1985 a. 216; 1987 a. 325; 1989 a. 23, 31; 1995 a. 396; 1997 a. 237; 1999 a. 30; 2003 a. 261; 2005 a. 253; 2007 a. 170; 2009 a. 342.

12 **SECTION 6.** 646.35 (1) (b) of the statutes is amended to read:

13 646.35 (1) (b) Life insurance and supplementary contracts providing for  
14 retained asset accounts.

History: 1979 c. 109; 1983 a. 120; 1985 a. 216; 1989 a. 23; 1995 a. 236; 2003 a. 261; 2005 a. 253; 2007 a. 168, 170.

15 **SECTION 7.** 646.35 (6) (b) of the statutes is amended to read:

16 646.35 (6) (b) In the case of a disability insurance policy that is neither  
17 guaranteed renewable nor noncancelable, the fund is not obligated to continue the  
18 policy in force beyond ~~the time required under s. 645.43~~ 30 days after the date the  
19 order of liquidation is entered or the date established in the liquidation order of  
20 another state, but may continue the coverage under any disability insurance policy  
21 for up to 180 days after the date of the liquidation order.

History: 1979 c. 109; 1983 a. 120; 1985 a. 216; 1989 a. 23; 1995 a. 236; 2003 a. 261; 2005 a. 253; 2007 a. 168, 170.

\*\*\*\*NOTE: As drafted now, this provision could be read in two different ways. The first way is that the fund is not obligated to continue the policy beyond either 30 days after the entry date of the order of liquidation or 30 days after the date established in the liquidation order of another state. The second way is that the fund is not obligated to

continue the policy beyond either 30 days after the entry date of the order or the date of the other state's liquidation order. Which ~~reading~~ correctly portrays your intent?

Version



**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-2242/7dn  
PJK:.....

PI  
gf

*Date*

Please review how I treated the tax change very carefully. I assumed that there were two types of taxes under s. 618.43, the general tax under s. 618.43 (1) (a) and the "penalty" tax under s. 618.43 (1) (d) and that s. 618.43 (1) (c) refers to both of those taxes. I assumed that the change on July 21, 2011, has no effect on s. 618.43 (1) (c) or (d) (note, however, that I did change the tax rate for ocean marine insurance in par. (d)). Instead of amending s. 618.43 (1) (a) and creating s. 618.43 (9), I created s. 618.43 (1) (bc) to do both. Please make sure that par. (bc) accomplishes all that is necessary but does not do more than what you intended.

Pamela J. Kahler  
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**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2242/P1dn  
PJK:kjf:ph

July 25, 2011

Please review how I treated the tax change very carefully. I assumed that there were two types of taxes under s. 618.43, the general tax under s. 618.43 (1) (a) and the "penalty" tax under s. 618.43 (1) (d) and that s. 618.43 (1) (c) refers to both of those taxes. I assumed that the change on July 21, 2011, has no effect on s. 618.43 (1) (c) or (d) (note, however, that I did change the tax rate for ocean marine insurance in par. (d)). Instead of amending s. 618.43 (1) (a) and creating s. 618.43 (9), I created s. 618.43 (1) (bc) to do both. Please make sure that par. (bc) accomplishes all that is necessary but does not do more than what you intended.

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State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott Walker, Governor
Theodore K. Nickel, Commissioner

Wisconsin.gov

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Web Address: oci.wi.gov

Date: June 10, 2011
To: Fred Nepple, General Counsel
From: Robert Luck, OCI attorney
Subject: Surplus Lines Changes Needed in Wisconsin to comply with NRRA

The Dodd Frank Wall Street Reform and Consumer Protection Act contained 8 pages called the Nonadmitted and Reinsurance Reform Act ("NRRA") (attached) which modified how states would regulate surplus lines business. NRRA was signed into law on July 21, 2010 with implementation to occur within 1 year or July 21, 2011. There is a 330 day period ending June 16, 2011 for states to enter into a compact, other agreement or comply with NRRA regarding the multi-state tax allocation. By virtue of the proposed legislation Wisconsin will chose to comply with NRRA but not enter any compact or agreement at this time. There are two competing proposed interstate compacts currently under consideration by the various states, NIMA or SLIMPACT, while a number of states are taking the approach proposed here of not entering into a compact.

SURPLUS LINES DATA FOR WISCONSIN

Wisconsin currently has a total of 1226 licensed surplus lines agents with only 184 of them resident in Wisconsin.

The amount of surplus lines tax collected is shown in the following table. These amounts paid for surplus lines tax compare to premium taxes (non-surplus liens tax) authorized insurers totaling over \$120,000,000 per year. OCI currently has no way of determining how much of the surplus lines or direct placement taxes are attributable to multi-state risks. The OCI Financial Bureau thinks that the ocean marine portion of the surplus lines taxes is very small - perhaps less than \$2,000 per year. The ocean marine portion of the premium tax for authorized insurers is estimated at about 0.2% to 0.3% of the premium.

Table with 4 columns: Year, Surplus Lines Taxes via Agents, Direct Placement Taxes, Authorized Ins'rs Premium Taxes. Rows for years 2010, 2009, 2008, 2007.

The NAIC staff estimates that 60-70% of surplus lines risks are single-state risks, although this is not based on hard data or applicable to any particular state.

## **NRRA COMPLIANCE**

Wisconsin is currently compliant with many of the NRRA requirements such as:

1. NRRA s. 523 - States need to allow surplus lines broker applications through the National Producer Database.
2. NRRA s. 524 - States cannot restrict the use of nonadmitted insurers who are listed in the quarterly Listing of Alien Insurers maintained by the NAIC.
3. NRRA s. 525 - States cannot require a due diligence search to show that admitted insurers will not write the coverage being written by a surplus lines insurer.

## **STATUTORY CHANGES NEEDED**

The changes that Wisconsin does need to conform to the NRRA apply to both surplus lines policies and directly placed policies under s. 618.42.

1. **NRRA DEFINITIONS NEEDED [see 618.38, 618.41(8)(c) & 618.416]** Definitions need to be added to ensure symmetry with NRRA.

Note: NRRA s. 527 (9) & (10) incorporate by reference the definition of “non-admitted insurance” from the NAIC Non-Admitted Insurance Model. The language in the newly created s. 618.416 uses the text of the NAIC Model cited by the NRRA.

2. **AUTHORIZATION TO COLLECT TAXES [see 618.43(1)(a) & 1., 2. & 3., delete 618.43(6) & 618.43(9)]** By only complying with NRRA and not joining a compact or agreement, Wisconsin would collect 100% of the taxes on surplus lines policies where Wisconsin is the home state of the insured. Wisconsin would not allocate any portion of the tax to another state. Conversely, for surplus lines policies where Wisconsin is not the home state, Wisconsin would not get any allocated portion of those taxes.

Specifically the statutes would need to provide for the payment of 100% of the surplus lines taxes on 100% of the gross premiums of a surplus lines policy where Wisconsin is the home state,

The following current statutes and rules require agents to forward all taxes related to single-state Wisconsin risks or multi-state risks partially located in Wisconsin to OCI. There needs to be changes to allow Wisconsin to collect the whole amount for the home state surplus lines policies as proposed in s. 618.43(9) and have no allocation.

**618.43(3) ACCOUNTING AND REPORTING.** The commissioner shall by rule prescribe accounting and reporting forms and procedures for insurers, agents or brokers and policyholders for the purpose of determining the **amount of the taxes owed, and the manner and time of payment.**

**618.43(6) ALLOCATION OF TAX.** **If a policy covers risks that are only partially located in this state, the premium shall be reasonably allocated among the states on the basis of risk locations in computing the tax,** except that all premiums received in this state or charged on policies written or negotiated in this state shall be taxable in full under this section, with a

credit for any tax actually paid in another state to the extent of a reasonable allocation on the basis of risk locations.

**3. CHANGE TO A SINGLE SURPLUS LINES TAX RATE [see 618.41(9)(a), 618.43(1)(a)1. & delete 618.43(1)(b)]**

Wisconsin should have a single tax rate for all surplus lines business in a state. Currently, Wisconsin charges a 3% tax rate for most surplus lines business with a 0.5% for ocean marine surplus lines tax as follows:

**618.43 Taxation of insurance written by unauthorized insurers. (1) BUSINESS SUBJECT TO TAXATION.**

(a) Except as provided in par. (b), insurers, agents, brokers and policyholders are liable, as provided in sub. (2), **for a premium tax of 3% of gross premiums** charged for insurance, excluding annuities, if any of the following are satisfied:

1. The insurance is transacted under s. 618.41 (1) or 618.42.
2. The insurance is transacted by an unauthorized insurer which is a risk retention group.
3. The insurance is transacted by an unauthorized insurer for a risk purchasing group for coverage of risks which reside or are otherwise located in this state.

(b) **For ocean marine insurance, the tax required under this subsection is 0.5%** of gross premiums charged for the insurance.

The best estimate of the surplus lines ocean marine business in Wisconsin is that it generates minimal taxes of perhaps \$2,000 per year. The proposed legislation will raise the ocean marine rate to be uniform with the surplus lines tax of 3%.

**4. HOME STATE PLACEMENT REQUIREMENTS [see 618.435]**

NRRA s. 522(a) provides that only the insured's home state may regulate the "placement" of a multistate surplus lines policy. Accordingly, Wisconsin will need to amend provisions in their surplus lines law to clarify that Wisconsin's "placement" requirements apply only where Wisconsin is the home state of the insured. It is unclear what is meant by "placement requirements" in NRRA but it probably only deals with the disclosure (see Ins 6.17) by the agent and the taxes.

**SEC. 522. REGULATION OF NONADMITTED INSURANCE BY INSURED'S HOME STATE.**

(a) **HOME STATE AUTHORITY.—Except as otherwise provided in this section, the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the insured's home State.**

**5. HOME STATE SURPLUS LINES BROKER LICENSING REQUIREMENTS [see 628.03(1p)]**

NRRA s. 522(b) provides that only the insured's home state may require a surplus lines broker to be licensed to sell, solicit or negotiate nonadmitted insurance with respect to that Home-State insured even if it is a multi-state risk covering risks in Wisconsin. Accordingly, Wisconsin may need to amend provisions in their surplus lines law to clarify that licensure is required only where the state is the home state of the insured. NRRA does not affect worker compensation insurance.

**SEC. 522. REGULATION OF NONADMITTED INSURANCE BY INSURED'S HOME STATE. . . .**

(b) **BROKER LICENSING.—No State other than an insured's home State may require a surplus lines broker to be licensed in order to sell, solicit, or negotiate nonadmitted insurance with respect to such insured.**

Section 628.03 needs to be amended to specify the surplus lines agent licensing requirements do not apply for a multi-state risk where Wisconsin is not the Home-State.

**6. Clarify the scope of policies under the surplus lines agents responsibility [see 618.41(8)(a)]**

The proposed legislation includes clarification all surplus lines policy placements are subject to this provision. The current language is awkward in this regard and could be misconstrued.

**7. FIX FOR THE SURPLUS LINES FORMS ISSUE IN GILLEN CASE [see 631.20(7) & 631.85]** The US District Court – Eastern District of Wisconsin found in the Edward E. Gillen Co. v. Ins. Co. of the State of Pa., 2010 U.S. Dist. LEXIS 119202 (E.D. Wis. Nov. 2, 2010) that surplus lines forms require filing and approval under s. 631.20. The proposal clarifies the statutes so that it is not misconstrued. OCI, and Wisconsin courts, have never applied the statute as described by this court. For the same reason s. 631.85 is clarified.

# **Attachment 1: NRRA Provisions - Enacted July 21, 2010**

## **Subtitle B—State-Based Insurance Reform**

### **SEC. 511. SHORT TITLE.**

This subtitle may be cited as the “Nonadmitted and Reinsurance Reform Act of 2010”.

### **SEC. 512. EFFECTIVE DATE.**

Except as otherwise specifically provided in this subtitle, this subtitle shall take effect upon the expiration of the 12-month period beginning on the date of the enactment of this subtitle.

## **PART I—NONADMITTED INSURANCE**

### **SEC. 521. REPORTING, PAYMENT, AND ALLOCATION OF PREMIUM TAXES.**

(a) HOME STATE’S EXCLUSIVE AUTHORITY.—No State other than the home State of an insured may require any premium tax payment for nonadmitted insurance.

(b) ALLOCATION OF NONADMITTED PREMIUM TAXES.—

(1) IN GENERAL.—The States may enter into a compact or otherwise establish procedures to allocate among the States the premium taxes paid to an insured’s home State described in subsection (a).

(2) EFFECTIVE DATE.—Except as expressly otherwise provided in such compact or other procedures, any such compact or other procedures— (A) if adopted on or before the expiration of the 330-day period that begins on the date of the enactment of this subtitle, shall apply to any premium taxes that, on or after such date of enactment, are required to be paid to any State that is subject to such compact or procedures; and (B) if adopted after the expiration of such 330-day period, shall apply to any premium taxes that, on or after January 1 of the first calendar year that begins after the expiration of such 330-day period, are required to be paid to any State that is subject to such compact or procedures.

(3) REPORT.—Upon the expiration of the 330-day period referred to in paragraph (2), the NAIC may submit a report to the Committee on Financial Services and the Committee on the Judiciary of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate identifying and describing any compact or other procedures for allocation among the States of premium taxes that have been adopted during such period by any States.

(4) NATIONWIDE SYSTEM.—The Congress intends that each State adopt nationwide uniform requirements, forms, and procedures, such as an interstate compact, that provide for the reporting, payment, collection, and allocation of premium taxes for nonadmitted insurance consistent with this section.

(c) ALLOCATION BASED ON TAX ALLOCATION REPORT.—To facilitate the payment of premium taxes among the States, an insured’s home State may require surplus lines brokers and insureds who have independently procured insurance to annually file tax allocation reports with the insured’s home State detailing the portion of the nonadmitted insurance policy premium or premiums attributable to properties, risks, or exposures located in each State. The filing of a nonadmitted insurance tax allocation report and the payment of tax may be made by a person authorized by the insured to act as its agent.

**SEC. 522. REGULATION OF NONADMITTED INSURANCE BY INSURED'S HOME STATE.**

(a) HOME STATE AUTHORITY.—Except as otherwise provided in this section, the placement of nonadmitted insurance shall be subject to the statutory and regulatory requirements solely of the insured's home State.

(b) BROKER LICENSING.—No State other than an insured's home State may require a surplus lines broker to be licensed in order to sell, solicit, or negotiate nonadmitted insurance with respect to such insured.

(c) ENFORCEMENT PROVISION.—With respect to section 521 and subsections (a) and (b) of this section, any law, regulation, provision, or action of any State that applies or purports to apply to nonadmitted insurance sold to, solicited by, or negotiated with an insured whose home State is another State shall be preempted with respect to such application.

(d) WORKERS' COMPENSATION EXCEPTION.—This section may not be construed to preempt any State law, rule, or regulation that restricts the placement of workers' compensation insurance or excess insurance for self-funded workers' compensation plans with a nonadmitted insurer.

**SEC. 523. PARTICIPATION IN NATIONAL PRODUCER DATABASE.**

After the expiration of the 2-year period beginning on the date of the enactment of this subtitle, a State may not collect any fees relating to licensing of an individual or entity as a surplus lines broker in the State unless the State has in effect at such time laws or regulations that provide for participation by the State in the national insurance producer database of the NAIC, or any other equivalent uniform national database, for the licensure of surplus lines brokers and the renewal of such licenses.

**SEC. 524. UNIFORM STANDARDS FOR SURPLUS LINES ELIGIBILITY.**

A State may not—

- (1) impose eligibility requirements on, or otherwise establish eligibility criteria for, nonadmitted insurers domiciled in a United States jurisdiction, except in conformance with such requirements and criteria in sections 5A(2) and 5C(2)(a) of the 220 Non-Admitted Insurance Model Act, unless the State has adopted nationwide uniform requirements, forms, and procedures developed in accordance with section 521(b) of this subtitle that include alternative nationwide uniform eligibility requirements; or
- (2) prohibit a surplus lines broker from placing nonadmitted insurance with, or procuring nonadmitted insurance from, a nonadmitted insurer domiciled outside the United States that is listed on the Quarterly Listing of Alien Insurers maintained by the International Insurers Department of the NAIC.

**SEC. 525. STREAMLINED APPLICATION FOR COMMERCIAL PURCHASERS.**

A surplus lines broker seeking to procure or place nonadmitted insurance in a State for an exempt commercial purchaser shall not be required to satisfy any State requirement to make a due diligence search to determine whether the full amount or type of insurance sought by such exempt commercial purchaser can be obtained from admitted insurers if—

- (1) the broker procuring or placing the surplus lines insurance has disclosed to the exempt commercial purchaser that such insurance may or may not be available from the admitted market that may provide greater protection with more regulatory oversight; and
- (2) the exempt commercial purchaser has subsequently requested in writing the broker to procure or place such insurance from a nonadmitted insurer.



## **SEC. 526. GAO STUDY OF NONADMITTED INSURANCE MARKET.**

(a) **IN GENERAL.**—The Comptroller General of the United States shall conduct a study of the nonadmitted insurance market to determine the effect of the enactment of this part on the size and market share of the nonadmitted insurance market for providing coverage typically provided by the admitted insurance market.

(b) **CONTENTS.**—The study shall determine and analyze— (1) the change in the size and market share of the nonadmitted insurance market and in the number of insurance companies and insurance holding companies providing such business in the 18-month period that begins upon the effective date of this subtitle; (2) the extent to which insurance coverage typically provided by the admitted insurance market has shifted to the nonadmitted insurance market; (3) the consequences of any change in the size and market share of the nonadmitted insurance market, including differences in the price and availability of coverage available in both the admitted and nonadmitted insurance markets; (4) the extent to which insurance companies and insurance holding companies that provide both admitted and nonadmitted insurance have experienced shifts in the volume of business between admitted and nonadmitted insurance; and (5) the extent to which there has been a change in the number of individuals who have nonadmitted insurance policies, the type of coverage provided under such policies, and whether such coverage is available in the admitted insurance market.

(c) **CONSULTATION WITH NAIC.**—In conducting the study under this section, the Comptroller General shall consult with the NAIC.

(d) **REPORT.**—The Comptroller General shall complete the study under this section and submit a report to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives regarding the findings of the study not later than 30 months after the effective date of this subtitle.

## **SEC. 527. DEFINITIONS.**

For purposes of this part, the following definitions shall apply:

(1) **ADMITTED INSURER.**—The term “admitted insurer” means, with respect to a State, an insurer licensed to engage in the business of insurance in such State.

(2) **AFFILIATE.**—The term “affiliate” means, with respect to an insured, any entity that controls, is controlled by, or is under common control with the insured.

(3) **AFFILIATED GROUP.**—The term “affiliated group” means any group of entities that are all affiliated.

(4) **CONTROL.**—An entity has “control” over another entity if— (A) the entity directly or indirectly or acting through 1 or more other persons owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the other entity; or (B) the entity controls in any manner the election of a majority of the directors or trustees of the other entity.

(5) **EXEMPT COMMERCIAL PURCHASER.**—The term “exempt commercial purchaser” means any person purchasing commercial insurance that, at the time of placement, meets the following requirements:

(A) The person employs or retains a qualified risk manager to negotiate insurance coverage.

(B) The person has paid aggregate nationwide commercial property and casualty insurance premiums in excess of \$100,000 in the immediately preceding 12 months.

(C)(i) The person meets at least 1 of the following criteria:

(I) The person possesses a net worth in excess of \$20,000,000, as such amount is adjusted pursuant to clause (ii).

- (II) The person generates annual revenues in excess of \$50,000,000, as such amount is adjusted pursuant to clause (ii).
- (III) The person employs more than 500 full-time or full-time equivalent employees per individual insured or is a member of an affiliated group employing more than 1,000 employees in the aggregate.
- (IV) The person is a not-for-profit organization or public entity generating annual budgeted expenditures of at least \$30,000,000, as such amount is adjusted pursuant to clause (ii).
- (V) The person is a municipality with a population in excess of 50,000 persons.
- (ii) Effective on the fifth January 1 occurring after the date of the enactment of this subtitle and each fifth January 1 occurring thereafter, the amounts in subclauses (I), (II), and (IV) of clause (i) shall be adjusted to reflect the percentage change for such 5-year period in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

(6) HOME STATE.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term “home State” means, with respect to an insured— (i) the State in which an insured maintains its principal place of business or, in the case of an individual, the individual’s principal residence; or (ii) if 100 percent of the insured risk is located out of the State referred to in clause (i), the State to which the greatest percentage of the insured’s taxable premium for that insurance contract is allocated.

(B) AFFILIATED GROUPS.—If more than 1 insured from an affiliated group are named insureds on a single nonadmitted insurance contract, the term “home State” means the home State, as determined pursuant to subparagraph (A), of the member of the affiliated group that has the largest percentage of premium attributed to it under such insurance contract.

(7) INDEPENDENTLY PROCURED INSURANCE.—The term “independently procured insurance” means insurance procured directly by an insured from a nonadmitted insurer.

(8) NAIC.—The term “NAIC” means the National Association of Insurance Commissioners or any successor entity.

(9) NONADMITTED INSURANCE.—The term “nonadmitted insurance” means any property and casualty insurance permitted to be placed directly or through a surplus lines broker with a nonadmitted insurer eligible to accept such insurance.

(10) NON-ADMITTED INSURANCE MODEL ACT.—The term “Non-Admitted Insurance Model Act” means the provisions of the Non-Admitted Insurance Model Act, as adopted by the NAIC on August 3, 1994, and amended on September 30, 1996, December 6, 1997, October 2, 1999, and June 8, 2002.

(11) NONADMITTED INSURER.—The term “nonadmitted insurer”— (A) means, with respect to a State, an insurer not licensed to engage in the business of insurance in such State; but (B) does not include a risk retention group, as that term is defined in section 2(a)(4) of the Liability Risk Retention Act of 1986 (15 U.S.C. 3901(a)(4)).

(12) PREMIUM TAX.—The term “premium tax” means, with respect to surplus lines or independently procured insurance coverage, any tax, fee, assessment, or other charge imposed by a government entity directly or indirectly based on any payment made as consideration for an insurance contract for such insurance, including premium deposits, assessments, registration fees, and any other compensation given in consideration for a contract of insurance.

(13) QUALIFIED RISK MANAGER.—The term “qualified risk manager” means, with respect to a policyholder of commercial insurance, a person who meets all of the following requirements:

(A) The person is an employee of, or third-party consultant retained by, the commercial policyholder.

(B) The person provides skilled services in loss prevention, loss reduction, or risk and insurance coverage analysis, and purchase of insurance.

(C) The person— (i)

(I) has a bachelor’s degree or higher from an accredited college or university in risk management, business administration, finance, economics, or any other field determined by a State insurance commissioner or other State regulatory official or entity to demonstrate minimum competence in risk management; and

(II)(aa) has 3 years of experience in risk financing, claims administration, loss prevention, risk and insurance analysis, or purchasing commercial lines of insurance; or (bb) has—

(AA) a designation as a Chartered Property and Casualty Underwriter (in this subparagraph referred to as “CPCU”) issued by the American Institute for CPCU/Insurance Institute of America; (BB) a designation as an Associate in Risk Management (ARM) issued by the American Institute for CPCU/Insurance Institute of America; (CC) a designation as Certified Risk Manager (CRM) issued by the National Alliance for Insurance Education & Research; (DD) a designation as a RIMS Fellow (RF) issued by the Global Risk Management Institute; or (EE) any other designation, certification, or license determined by a State insurance commissioner or other State insurance regulatory official or entity to demonstrate minimum competency in risk management;

(ii)(I) has at least 7 years of experience in risk financing, claims administration, loss prevention, risk and insurance coverage analysis, or purchasing commercial lines of insurance; and (II) has any 1 of the designations specified in subitems (AA) through (EE) of clause (i)(II)(bb);

(iii) has at least 10 years of experience in risk financing, claims administration, loss prevention, risk and insurance coverage analysis, or purchasing commercial lines of insurance; or (iv) has a graduate degree from an accredited college or university in risk management, business administration, finance, economics, or any other field determined by a State insurance commissioner or other State regulatory official or entity to demonstrate minimum competence in risk management.

(14) REINSURANCE.—The term “reinsurance” means the assumption by an insurer of all or part of a risk undertaken originally by another insurer.

(15) SURPLUS LINES BROKER.—The term “surplus lines broker” means an individual, firm, or corporation which is licensed in a State to sell, solicit, or negotiate insurance on properties, risks, or exposures located or to be performed in a State with nonadmitted insurers.

(16) STATE.—The term “State” includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands, and American Samoa.



State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott Walker, Governor  
Theodore K. Nickel, Commissioner

Wisconsin.gov

**Legal Unit**  
125 South Webster Street • P.O. Box 7873  
Madison, Wisconsin 53707-7873  
Phone: (608) 267-9586 • Fax: (608) 264-6228  
Web Address: oci.wi.gov

Date: August 16, 2011  
To: Pam Kahler  
From: Fred Nepple  
Subject: Response to LRB-2242/P1

I expect we will forward tomorrow a few changes to clarify the recent auto insurance legislation. Meanwhile the following responds to your inquiries:

✓ 1) Page 2, line 13.

Delete lines 11 and 12 and substitute the following for line 13:

“Affiliated group” means all persons who control, are controlled by, or under under common control with, an insured.”

✓ 2) Page 2, after line 15.

No. “Unauthorized insurer” means an insurer that is not licensed in THIS state, a broader term than an insurer that is not licensed in the HOME state. The intent is to preserve the law that prohibits sale of insurance in this state unless the insurer is either licensed in this state, or the insurance is sold under surplus lines standards. The NAIC model is admittedly not well drafted in this area.

Conceptually this means the draft must reflect two types of sales by an insurer not licensed in this state:

1. A sale under s. 618.41 or 618.42 where the insured’s home state is Wisconsin; and
2. A sale under s. 618.41 or 618.42 where the insured’s home state is NOT Wisconsin but the risk resides in Wisconsin.

Conversely the draft must take care to not legalize sales of insurance by insurers not licensed in Wisconsin on risks residing in this state where the sale does not comply with s. 618.41 or 618.42.

Hence page 4, lines 22 to 24 should be revised to read as follows:

618.405 Application of Wisconsin Law. The placement of insurance under s. 618.41 is not subject to s. 618.41 (4), (7m), (8), (9) or (10) if this state is not the insured's home state and the placement complies with the laws of the insured's home state.

NOTE: Section 618.42 is not referenced because s. 618.42 (1) authorizes sales by an unauthorized insurer regardless of whether Wisconsin is the insured's home state and s. 618.42 (2) and (3) remain applicable regardless of whether the insured's home state is Wisconsin.

Sections 618.41 (1), (2), and (3) are not referenced because they establish the conditions authorizing a surplus lines sale by an unauthorized insurer, s. 618.41 (4) is not referenced because it applies only basic standards to the sale, s. 618.41 (5) is not referenced because it permits the commissioner to by rule limit risks that may be covered by surplus lines insurance, s. 618.41 (6m) is not referenced because it establishes standards for rust proofing warranties sold in this state, s. 618.41 (7) is not referenced because it is permissive, and s. 618.41 (11) is not referenced because it provides authority for the commissioner to subject surplus lines policies to the insurance code.

✓ 3) Page 3, line 16.

Ok. The draft does not include the concept in the NAIC Model of shared premium tax of a multistate risk. Hence this definition is not necessary.

✓ 4) Page 5, line 9.

Please revise the underlined language on line 9 to read:

"unless this state is the insured's home state"

NOTE: If this state is the insured's home state then the new s. 618.416 applies. This also clarifies the issue described in your note.

✓ 5) Page 6, line 5.

"Proposed" is ok

✓ 6) Page 7, line 23.

". . . with respect to premiums charged on policies issued or renewed on or after July 21, 2011 . . ." works.

✓ 7) Page 8, line 5.

Yes

✓ 8) Page 8, line 13.

"gross premiums charged on policies issued or renewed before July 21,

2011 . . .”

✓ 9) Page 9, line 23.

No. Rust proofing insurance can be issued by either by an authorized insurer or on a surplus lines basis. Hence absent the exception a form providing rust proofing insurance issued on a surplus lines basis would not be required to be filed with OCI.

✓ 10) Page 12, line 4.

The intent is to give policyholders 30 days after the date of either an order of liquidation issued under Chapter 645, if it is a Wisconsin liquidation, or 30 days after the date of entry of an order of liquidation of any other state, if the company is a nondomestic, which would be your second interpretation. The language should be something like “. . . in force beyond 30 days after the date an order of liquidation is entered either under ch. 645 or the liquidation laws of another state.”

✓ 11) Page 12, line 9.

Ok

✓ 12) Your treatment of the tax change is ok.

**Kahler, Pam**

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**From:** Nepple, Fred - OCI [Fred.Nepple@wisconsin.gov]  
**Sent:** Monday, August 22, 2011 11:05 AM  
**To:** Kahler, Pam  
**Cc:** Guidry, Jim R - OCI  
**Subject:** Auto Changes OCI Technical Bill 2011 08 22.doc  
**Attachments:** Auto Changes OCI Technical Bill 2011 08 22.doc

Pam

Attached are the "clarifications" to be included in the Technical Bill that relate to the recent auto insurance legislation.

## **OCI Analysis of the proposed changes to s. 632.32, Stats.**

These proposed changes are needed to clarify the Act 14 changes. Those changes attempted to change the law back to most of the pre-Act 28 requirements. However it left some areas with uncertainty that had been resolved in other statute changes and rule changes previously.

One area that previously was clarified was to distinguish commercial liability policies and commercial auto policies. In general, commercial auto policies should be subject to the same requirements as other auto policies and distinguished from commercial liability policies (see changes 1 & 2)

Another area of the law which has been problematic is commercial liability policies which cover only non-owned and hired vehicles. By rule OCI had clarified this distinction so that if commercial liability policies covered any owned vehicles or the policy is a commercial auto policy, it should be subject to the Medical Payments, UM and UIM provisions. Conversely, if commercial liability policies covered only non-owned or hired vehicles, it would not be subject to the Medical Payments, UM and UIM provisions. In addition, consumer auto policies can be purchased which only cover hired or non-owned vehicles and these policies should be subject to the same requirements as other auto policies. These changes attempt to clarify this issue. (See changes 3, 5 & 7.)

Two sections need to be harmonized so that it is clear that only one named insured need reject coverage. Many policies have more than one named insured such as a husband and a wife. The insurer should not have to seek rejection of med pay or underinsured motorist coverage from both parties. This was the intent but it isn't clearly stated. These changes will rectify that intent. (See changes 4 & 6.)



The changes to the draft are as follows:

1. Create 632.32(2)(ab)

(ab) "Commercial automobile liability policy" means a liability insurance policy intended principally to provide primary coverage for the insured's liability arising out of the ownership, maintenance or use of a motor vehicle in the insured's business or for other commercial activities.

2. Amend 632.32(2)(ac)

632.32(2)(ac) "Commercial liability policy" means any form of liability insurance policy, including a commercial or business package policy or a policy written on farm and agricultural operations, that is intended principally to provide primary coverage for the insured's general liability arising out of its business or other commercial activities, and that includes coverage for the insured's liability arising out of the ownership, maintenance, or use of a motor vehicle as only one component of the policy or as coverage that is only incidental to the principal purpose of the policy. "Commercial liability policy" does not include a worker's compensation policy or a commercial automobile liability policy.

3. Amend 632.32(4)(a):

632.32(4) REQUIRED UNINSURED MOTORIST AND MEDICAL PAYMENTS COVERAGES. (a) Except as provided in par. (d), every policy of insurance subject to this section that insures with respect to any ~~owned~~ motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall contain therein or supplemental thereto provisions for all of the following coverages:

4. Amend 632.32(4)(bc):

632.32(4)(bc) Notwithstanding par. (a) 2., the named insured may reject medical payments coverage. If ~~the~~ one named insured rejects the coverage, the coverage need not be provided in a subsequent renewal policy issued by the same insurer unless the insured requests it in writing.

5. Amend 632.32(4)(d)

632.32(4)(d) This subsection does not apply to commercial liability policies if the coverage it provides for the insured's liability arising out of the maintenance or use of a motor vehicle is limited to coverage for non-owned motor vehicles or umbrella or excess liability policies but if medical payments coverage or uninsured motorist coverage is written, then it must have limits of at least those specified in par. (a).

6. Amend 632.32(4m)(a)

632.32(4m)(a) UNDERINSURED MOTORIST COVERAGE. (a) Except as provided in par. (e), an insurer writing policies that insure with respect to a motor vehicle registered or principally garaged in this state against loss resulting from liability imposed by law for bodily injury or death suffered by a person arising out of the ownership, maintenance, or use of a motor vehicle shall provide to one named insured under each such insurance policy that goes into effect after November 1, 2011, that is written by the insurer and that does not include underinsured motorist coverage written notice of the availability of underinsured motorist coverage, including a brief description of the coverage. An insurer is required to provide the notice required under this paragraph only one time and in conjunction with the delivery of the policy.

7. Amend 632.32(4m)(e)

632.32(4m)(e) This subsection does not apply to commercial liability policies if the coverage it provides for the insured's liability arising out of the maintenance or use of a motor vehicle is limited to coverage for non-owned motor vehicles or umbrella or excess liability policies but if underinsured motorist coverage is written, then it must have limits of at least those specified in par. (d).

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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**EDWARD E. GILLEN CO.,**

Plaintiff,

Case No. 10-C-564

-vs-

**THE INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA and  
LEXINGTON INSURANCE COMPANY,**

Defendants.

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**DECISION AND ORDER**

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In 2006, Edward E. Gillen Company ("Gillen") was hired to design and install an earth retention system ("ERS"), the purpose of which was to stabilize the ground to enable the construction of a new school building for the Latin School of Chicago. On May 2, 2006, an adjacent property owner sustained damage and the project was delayed, ultimately resulting in an adverse arbitration award being entered against Gillen in the amount of \$2,163,369.08. Liberty Mutual Insurance Company ("Liberty") paid its policy limit of \$1 million dollars. Gillen now seeks declaratory relief that it is entitled to indemnification for the balance of the award from The Insurance Company of the State of Pennsylvania ("ICSOP") and Lexington Insurance Company ("Lexington").

On August 23, Lexington filed a demand for arbitration with the American Arbitration Association. The next day, Lexington moved to dismiss and/or stay Gillen's claims in favor of arbitration. In response, Gillen moves for an order enjoining Lexington from pursuing

arbitration proceedings. For the reasons that follow, Lexington's motion to dismiss is denied,<sup>1</sup> and Gillen's motion for a preliminary injunction is granted.

Gillen is a Wisconsin corporation with its principal place of business located in Milwaukee. Gillen maintains a small office in Illinois, but its business, financial and management functions occur in Wisconsin. Gillen is engaged in the construction industry; specifically, the design and construction of foundations or other underground structural systems for buildings and other structures. Lexington is a foreign insurance corporation with its principal place of business in Boston, Massachusetts. ICSOP is a foreign corporation with its principal place of business in New York, New York. Accordingly, the parties are completely diverse and the Court may exercise jurisdiction pursuant to 28 U.S.C. § 1332(a).

Lexington identifies itself as a surplus lines insurer, which is an "unlicensed carrier operating without a certificate of authority to do business in Wisconsin, but nonetheless permitted to do so (generally because there are no licensed carriers in the state offering coverage for a particular type of risk) if certain conditions are met." *Combined Investigative Servs., Inc. v. Scottsdale Ins. Co.*, 477 N.W.2d 82, 83 (Wis. Ct. App. 1991); Wis. Stat. § 618.41 (Surplus lines insurance). Lexington executed and delivered to Gillen an Architects and Engineers Professional Liability Policy, effective for the policy period from January 1, 2006 to January 1, 2007. The Policy insured Gillen on a claims made basis up to \$5,000,000 per claim and policy aggregate.

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<sup>1</sup> ICSOP also moves to dismiss. The Court will address ICSOP's motion in a separate order.

The Policy contains a mandatory arbitration provision, which provides that “in the event of a disagreement as to the interpretation of this policy, it is mutually agreed that such dispute shall be submitted to binding arbitration before a panel of three (3) arbitrators, consisting of two (2) party-nominated (non-impartial) arbitrators and a third (impartial) arbitrator (hereinafter ‘umpire’) as to the sole and exclusive remedy.” Section 631.85, Wis. Stats., provides that an insurance policy “may contain provision for independent appraisal and compulsory arbitration, *subject to the provisions of s. 631.20.*” § 631.85 (Appraisal or arbitration) (emphasis added). Section 631.20(1) provides, in turn, that no “form *subject to s. 631.01(1)* . . . may be used unless it has been filed with and approved by the commissioner and unless the insurer certifies that the form complies with chs. 600 to 655 and rules promulgated under chs. 600 to 655.” § 631.20 (Filing and approval of forms) (emphasis added). Finally, § 631.01(1) provides, in relevant part, that “[t]his chapter [ch. 631] and ch. 632 apply to *all insurance policies* and group certificates delivered or issued for delivery in this state, on property ordinarily located in this state, on persons residing in this state when the policy or group certificate is issued, or on business operations in this state. . . .” (emphasis added). Accordingly, if an unapproved form<sup>2</sup> is used as an insurance policy issued for delivery in this state, or is otherwise subject to the requirements of § 631.01(1), a mandatory arbitration clause included therein cannot be enforced by the insurer. *Appleton Papers, Inc. v. Home Indemnity Co.*, 612 N.W.2d 760, 770 (Wis. Ct. App. 2000) (“Section

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<sup>2</sup> A “Form” is a “policy, group certificate, or application prepared for general use and does not include one specially prepared for use in an individual case.” Wis. Stat. § 600.03(21). By contrast, a “Policy” is “any document . . . used to describe in writing the terms of an insurance contract, including endorsements and riders and service contracts issued by motor clubs.” § 600.03(35).

631.15(3m) requires that the policy must conform to § 631.85. That is accomplished here by, in effect, removing the arbitration provision that Home failed to obtain approval for. The policy is therefore enforceable as though the arbitration provisions did not exist”).

Lexington concedes that the form used for Gillen’s policy was not filed for approval with the Wisconsin Insurance Commissioner. Lexington also does not dispute that Gillen’s policy was either “delivered or issued for delivery in this state” or was “on business operations in this state.” § 631.01(1). Lexington argues only that as a surplus lines insurer, it is not subject to any of the requirements set forth in ch. 631, including §§ 631.20 and 631.85, because the commissioner has not enacted any rules to that effect. Lexington relies on a provision in the surplus lines insurance section, § 618.41, which provides that the commissioner “may by rule subject policies written under this section to as much of the regulation provided by chs. 600 to 646 and 655 for comparable policies written by authorized insurers as the commissioner finds to be necessary to protect the interests of insureds and the public in this state.” § 618.41(11). This interpretation directly conflicts with § 631.01(1), which provides that ch. 631 applies to *all* insurance policies delivered or issued for delivery in this state. Section 631.01(1) lists a number of exceptions, including those listed in § 600.01 and § 618.42 (Direct procurement of insurance), but surplus lines insurance, § 618.41, is nowhere to be found. Conversely, other statutory provisions expressly exempt surplus lines insurers. *See, e.g.*, Wis. Stat. § 646.01(j). If, as Lexington argues, surplus lines insurers are not subject to chapters 600 to 646 unless the commissioner says so, then the language

exempting surplus lines insurers from ch. 646 would be meaningless.<sup>3</sup> Therefore, surplus lines insurance policies are subject to chapter 631, including §§ 631.20 and 631.85, and Lexington cannot enforce the arbitration provision because of its failure to gain approval for its form. At a minimum, Gillen is reasonably likely to succeed on its claim that the underlying dispute is not arbitrable.

Before entering the injunction sought by Gillen, the Court must also examine whether Gillen will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue. *Plummer v. Am. Inst. of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). This requirement is easily met. Numerous cases hold that a party forced into an unauthorized arbitration proceeding is “irreparably harmed by being forced to expend time and resources arbitrating an issue that is not arbitrable, and for which any award would not be enforceable.” *Md. Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 985 (2d Cir. 1997); *see also McLaughlin Gormley King Co. v. Terminix Int’l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (“If a court has concluded that a dispute is *non*-arbitrable, prior cases uniformly hold that the party urging arbitration may be enjoined from pursuing what would now be a futile arbitration, even if the threatened irreparable injury to the other party is only the cost of defending the arbitration and having the court set aside any unfavorable award”); *U.S. for Use and Benefit of Capital Elec. Const. Co., Inc. v. Pool and Canfield, Inc.*, 778 F.

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<sup>3</sup> Lexington also cites § 631.01(5) (OTHER EXCEPTIONS), which provides that the commissioner “may by rule exempt any class of insurance contract or insurer from any or all of the provisions of this chapter [ch. 631] and ch. 632 if the interests of Wisconsin insureds or creditors or of the public of this state do not require such regulation.” To the Court’s knowledge, the commissioner has not issued a rule exempting surplus lines insurers from chapter 631 pursuant to § 631.01(5).

Supp. 1088, 1092 (W.D. Mo. 1991) (“It would be irrational to hold that there is no irreparable harm in forcing a party to be subjected to the cost and hardship of a meaningless proceeding simply because it could be later reviewed by a proper forum”).

Finally, the Court must examine whether the threatened injury to Gillen outweighs the threatened harm the injunction may inflict on Lexington, and also whether granting the injunction will harm the public interest. *Plummer*, 97 F.3d at 229. The threatened injury to Gillen far outweighs the threatened injury if the Court wrongfully enjoins Lexington from pursuing arbitration at this time. The injury from being wrongfully forced to arbitrate is irreparable, but Lexington is only facing a delay in the arbitration process if it turns out that the arbitration provision is enforceable. Finally, granting the injunction would not harm the public interest. The general public policy in favor of arbitration does not apply to insurance contracts in Wisconsin, at least to extent that the relevant forms are not approved by the insurance commissioner. *Appleton Papers*, 612 N.W.2d at 771 (public policy in favor of arbitration “does not apply to insurance policies, as evidenced by the plain language of Wis. Stats. § 631.85. The legislature pronounced this state’s public policy when it subjected mandatory arbitration provisions in insurance policies to insurance commissioner approval”).

Federal Rule of Civil Procedure 65(c) provides that the Court “may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” As noted, the only potential harm to Lexington is a delay in pursuing arbitration while the issue is litigated here in federal



court. A bond is generally unnecessary “where there has been no proof of likelihood of harm, or where the injunctive order was issued ‘to aid and preserve the court’s jurisdiction over the subject matter involved.’” *Doctor’s Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (quoting *Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir. 1961)). Moreover, the strength of Gillen’s position counsels against requiring security. *Huntington Learning Centers, Inc. v. BMW Educ., LLC*, No. 10-C-79, 2010 WL 1006545, at \*1 (E.D. Wis. March 15, 2010) (security unnecessary when there is “virtually no risk that the defendants will be wrongfully enjoined by the forthcoming injunction”).

**NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:**

1. Lexington’s motion to dismiss [D. 24] is **DENIED**; and
2. Gillen’s motion for a preliminary injunction [D. 30] is **GRANTED**. Lexington is enjoined from pursuing the arbitration proceedings it commenced on August 23, 2010 against Gillen.

Dated at Milwaukee, Wisconsin, this 2nd day of November, 2010.

**SO ORDERED,**

*s/ Rudolph T. Randa*  
**HON. RUDOLPH T. RANDA**  
**U.S. District Judge**