

ISSUES REGARDING THE DISCONTINUATION OR WITHDRAWAL OF BUSINESS FROM THE INSURANCE MARKETPLACE – STREAMLINING THE PROCESS

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Since the early 1990s, most states have adopted either statutes, regulations, bulletins or so-called “desk shelf” rules which regulate the anticipated withdrawal of a product, line or subline of insurance business from the insurance marketplace. What constitutes a “withdrawal” or its equivalent under each state’s statutory or regulatory scheme is critical in determining the amount of red tape which an insurer must endure before consummating what was once considered a “routine business transaction.” The laws differ vastly by state as is evident from the discussions below. Although this article primarily focuses upon relevant New Jersey laws, reference is made to similar laws in various other jurisdictions, both by way of comparison and example.²

The Withdrawal Trigger

The term “withdraw” or “withdrawal” is perhaps most comprehensively defined under the onerous New Jersey so-called “orderly withdrawal” regulations³ which contain a 20-point list of items required of the withdrawing insurer. The Commissioner of the New Jersey Department of Banking and Insurance (“Commissioner”) has discretion to allow waiver of some or all of these items.⁴ The Commissioner also has discretion to require surrender of the withdrawing insurer’s or its affiliates’ Certificate of Authority in the course of withdrawal. If the Commissioner decides to require such surrender, she “shall” prohibit, for a period of “up to five years,” the insurer and its affiliates from acquiring “directly or indirectly” a controlling interest in an insurer authorized in New Jersey, without the Commissioner’s permission.⁵ The most common “withdrawal triggers” which necessitate either the filing of a plan, or a written request for an exemption from formal filing (which generally requires the filing of substantial documentation nonetheless) are:

1. Non-renewal, cancellation or termination of a policy;
2. Surrender of authority to transact the business of insurance in New Jersey (business of insurance itself is broadly defined to include all lines or sublines of business);
3. Actions equivalent to a withdrawal, including, but not limited to (a) elimination of a rating system, (b) termination of agency contracts, (c) reduction in agency commissions, (d) restrictions on agency solicitation or binding authority, (e) insurer refusal of applications or declaration of dividend to an affiliate; and
4. Physical surrender or amendment of Certificate of Authority.

Significantly, however, only when the above activities “exceed those occurring in the ordinary course of business is ‘withdrawal’ triggered.”⁶ Withdrawal also can occur via the transfer to another insurer of insurance business, “pursuant to an assumption agreement . . . or a portfolio reinsurance agreement . . .”⁷ Many insurers routinely transfer books of business either between or among affiliates, or sell books of business to nonaffiliates, either as part of ongoing corporate restructuring or the realignment of corporate goals. Unfortunately, in the author’s experience, such transactions are rarely viewed by the scrutinizing regulator as within the “ordinary course.” New Jersey’s strict withdrawal laws, therefore, must be considered, and either the insurer or its counsel must make its way through the regulatory maze.

The Filing of a Plan or a Reasonable Substitute

If the Commissioner and her staff cannot be persuaded that an exemption is applicable, then a formal plan will have to be filed and approved by the Commissioner. Even if the Commissioner’s staff ultimately determines that a “reasonable” substitute withdrawal procedure which may be approved by the Commissioner is appropriate, it is often nearly as burdensome a process as the filing of a full-blown plan.⁸

The following are the required plan contents under the New Jersey Regulations:

1. Reasons for withdrawal, including documentation of the applicant's financial condition for the three last years "or such other period as the Commissioner considers appropriate";
2. The proposed commencement date of the withdrawal;
3. A description of (a) all authority currently and previously held by the Applicant in jurisdictions, specifically listing states in which the Applicant has withdrawn, (b) New Jersey authority currently and previously held by its insurer affiliates, including dates of issuance, surrender, suspension or revocation, and (c) authority in other jurisdictions held by the Applicant or its insurer affiliates that recently has been surrendered or is intended for surrender currently and in the future;
4. An organizational chart and narrative description of relationship among the Applicant and its insurer affiliates;⁹
5. A description, by line of insurance written in New Jersey, of the applicant's and its insurer affiliates' business (both property/casualty and life/health) during the last three years, including for each year the corresponding premium volume, number of current policyholders, number of exposures, approximate market share and the number of insurance producers and employees servicing the business. If employees of the applicant or any of its affiliates will be terminated in this State as a result of the applicant's withdrawal, a description of the method of termination, a description of the termination benefits, and any other financial or nonfinancial accommodations made on the employees' behalf shall be included;
6. The address of each of the applicant's offices in New Jersey;
7. Copies of proposed cancellation and nonrenewal notices, and termination notices, the applicant intends to send to its policyholders and insurance producers, respectively, as well as any other withdrawal-related correspondence, including the proposed dates of such notices or correspondence. Producer termination notices shall comply with the requirements contained in N.J.S.A. 17:22-6.14(a);
8. In the case of a proposed withdrawal of life, health or annuity business to be effected through one or more assumption agreements, the proposed certificates of assumption and letters of notification (where appropriate) to policyholders informing them of the transfer of their policies to another insurer. In the case of a proposed withdrawal of other than life, health or annuity business to be effected through one or more portfolio reinsurance agreements, the reinsurance agreement(s) and letters of notification (where appropriate) to policyholders informing them of the reinsurance of their risks with another reinsurer.¹⁰
9. Name and address of each insurance producer, as well as the number of policies sold and premium volume produced by each producer, by line of insurance, for a 12-month period prior to the filing of the proposed plan;
10. A specimen copy of each producer contract;
11. Copies of all correspondence and notices to be sent to the New Jersey statutory entities which levy assessments upon insurers (*see* N.J.A.C. 11:2-29.4 for examples) as well as a description of all agreements (which need not be in final form) reached with such entities as to the applicant's financial and reporting obligations to them, as applicable; if not applicable, an explanation why;
12. A statement, by line of insurance written in this State, of all of the applicant's current incurred liabilities and reserves, including those incurred but not reported, as developed and certified by a "qualified actuary" as defined in N.J.A.C. 11:1-21.1 for property and casualty lines and by a Fellow of the Society of Actuaries for life and health lines, as of the date not earlier than 90 days prior to the submission of a proposed plan and which, in the case of insurance other than life, shall include certain subjects of information used by the actuary;¹¹
13. A description of the manner in which the applicant has in the past three years handled and intends to handle claims, premium factor charges, premium billing, and policyholder service regarding policies held by New Jersey residents

remaining in force after the plan has been approved. Provide a description of the applicant's staff adjusters servicing these claims, including the servicing location and the procedures for consumer contact;

14. A list of all the applicant's and its affiliates' statutory deposits, if any, currently held pursuant to N.J.S.A. 17:20-1 *et seq.*;
15. A description of the kind and amount of all reinsurance assumed and ceded by the applicant, identifying each ceding and assuming insurer and describing the corresponding risks in each reinsurance agreement. An explanation of whether the proposed withdrawal will affect the surplus of another insurer as a result of the loss of credit received by that insurer on any of the applicant's assumed reinsurance, as well as a description of the procedures designed to minimize any marketplace disruption or hazardous financial condition that may occur as result of the loss of credit;
16. A description of all multi-state accounts under which insurance has been provided for risks located in New Jersey, as well as an explanation of the impact of withdrawal on such risks;
17. The proposed amount of the special deposits required under N.J.A.C. 11:2-29.3(b)5, which shall be maintained until such time as the applicant's liabilities and potential liabilities no longer exist in New Jersey;
18. Written certification from a duly authorized officer of the applicant that the information submitted in the proposed plan is accurate and complete and that as long as policies are in force or there are outstanding New Jersey issues or expenses:
 - (i) The applicant shall fully honor all of its legal obligations in this State;
 - (ii) The applicant shall continue to service, without discrimination, all outstanding policies, bonds and surety obligations, which includes processing all usual and customary endorsements requested by insureds during the term of such policies, subject to the applicant's normal underwriting standards;
 - (iii) The applicant shall continue to submit annual statements and related information upon request, for as long as the applicant has any unearned premium or any unpaid or incurred losses in this State;
 - (iv) The applicant shall continue to operate in accordance with the laws and regulations of this State and remain subject to examination by the Department for as long as considered necessary by the Commissioner;
 - (v) The applicant shall not accept any business whatsoever in this State unless authorized or required by the Commissioner, including reinsurance and excess or surplus lines placements; and
 - (vi) The applicant shall maintain its designation of the Commissioner as its agent for service of process.
19. A method acceptable to the Commissioner to verify the applicant's compliance with its obligations under the plan as approved which may include, but is not limited to, quarterly financial and informational reports of the applicant's progress under the plan.
20. Any other information the Commissioner considers relevant to the evaluation of the request to withdraw.¹²

Perhaps the most obvious withdrawal trigger in New Jersey and elsewhere is the surrender or amendment of an insurer's Certificate of Authority. In New Jersey, the Commissioner is authorized by regulation to require a withdrawing insurer to surrender some or all Certificates held by the insurer or its affiliates, for amendment, termination, suspension, restriction, "or such other modification as the Commissioner considers appropriate" in the event of a withdrawal.¹³ Thus, in New Jersey, the amendment or surrender itself could trigger the withdrawal and, clearly a withdrawal triggers amendment or surrender.¹⁴ Significantly, if the Commissioner decides to require such a surrender of authority, she "shall" prohibit, for a period of "up to five years," the insurer and its affiliates from requiring "directly or indirectly" a controlling interest in an insurer authorized in New Jersey, without the Commissioner's permission.¹⁵

Although there are only fourteen states with formal withdrawal plan filing requirements, eleven additional states have notice requirements pursuant to which the state's insurance departments may request further information before permitting withdrawal. Eight states require a courtesy letter advising of the insurer's withdrawal-related activity. The remaining states do not appear to formally or specifically regulate withdrawals.¹⁶

If the New York Insurance Department finds that an insurer is withdrawing from transacting a “line” of business in New York, it will require surrender of authority for that “line,” and may require the insurer to perform other activities which ensure protection of New York policyholders, claimants and agents, such as maintaining a staff service office in New York and/or a toll-free (800) number routed directly to the insurer’s home office for the use of policyholders and claimants; requiring notification to New York agents; and requiring a security deposit with the Department. Maine, Oregon, Pennsylvania, Rhode Island, Texas and West Virginia have similar requirements regarding protection of their respective residents.

Termination of agents will serve as a potential trigger of withdrawal requirements in many states including, New Jersey, Pennsylvania and Virginia. In Florida, Idaho, Illinois, Maryland, Mississippi, Nevada, New York, North Carolina and Texas, there are subjective triggers for withdrawal requirements which depend upon the insurer and line in question, and those states’ Commissioners might find that the triggers are met by cessation of certain business by virtue of termination of policies.

Termination of policies serves as a potential trigger of withdrawal requirements in Idaho, Illinois, Maryland, New Jersey, New York, Pennsylvania and Virginia. There are subjective withdrawal triggers in Mississippi, Nevada and Texas, which those states’ Departments might find to be met by cessation of business depending upon the details of the cessation.

In several states, the line on which a particular policy was written is a critical factor in determining whether and how withdrawal requirements are implicated. Florida interprets withdrawal requirements as being triggered whenever (1) an insurer’s cessation of business will mean that the insurer’s NAIC Annual Financial Statement will no longer reflect Florida premium dollars attributable to a new or renewal business for the calendar year in the “line” in question; and (2) “line” is interpreted as meaning a line of premium income entry per the NAIC’s Annual Statement Preparation Instructions.

In Texas, the focus is upon whether the act in question results in a 75% reduction in premium income for a “line” of business in the insurer’s Annual Financial Statement.

Similarly, in Connecticut, Delaware and Maryland, the Department interprets “line” as that which appears separately on the Insurer’s Certificate. In those states, actions which will reflect an intent to withdraw from transactions such as separately listed “line” business will trigger withdrawal filing requirements. In those states, it is prudent to examine the actual Certificate of Authority of an insurer to determine whether a particular type of policy is, indeed, a separately reflected “line.”

Conversely, however, in Oregon the withdrawal and Certificate Amendment requirements are triggered only when an insurer is withdrawing from or elects to surrender authority for a “class” or “type” of business. There are no withdrawal requirements for an insurer that ceases transacting a “policy” of insurance in Oregon.

Streamlining the Process

While New Jersey is not alone in imposing enhanced scrutiny on an insurer’s decision to discontinue a line or type of business, routine business transactions should more readily be granted exemption from the strict scrutiny and formal process. Moreover, where there is otherwise regulatory oversight of a of transaction, an additional layer of regulatory review, i.e., a withdrawal process, should be deemed unnecessary. For example, in the context of an insurer acquisition which requires the filing of a so-called “Form A” and a full hearing before the Commissioner’s staff, a separate withdrawal filing arguably is unnecessary.

Additionally, the codification of required policyholder notices (in the event of nonrenewal or cancellation of policies) and offers of renewal coverage (in the event of a policy transfer) as well as specimen agent termination notices may assist in expediting the withdrawal process. In this fashion, carriers could follow the template without requiring multiple department staff to review forms. Finally, it is respectfully suggested that the withdrawal regulations be amended to impose strict time limits on all parties involved in the process, i.e., similar to those imposed in connection with a policy form filing under New Jersey law. Hence, an insurer who determines that a withdrawal trigger is implicated would have

a specified period of time to submit plan documents to the Department for review; the Department would have a specified time period to review those documents and submit comments to the insurer. Revisions to the filing and responses to the Department's comments would then be due shortly thereafter, and a consent order or letter approving the transaction could be required from the Department within a few days of the insurer's final submission. Without an end to the process, what was once truly a routine event could become both the insurer's and the regulator's worst nightmare.

Endnotes

1. Ms. Borrelli is a partner in the law firm of Bressler, Amery & Ross, P.C., with offices in New York City and Morristown, New Jersey. Ms. Borelli's practice focuses exclusively upon insurance regulation.
2. Ms. Borrelli's law firm conducts its law practice in New York and New Jersey only. Accordingly, any analysis herein regarding the laws of jurisdiction other than these two states is not intended to constitute legal opinions or advice and is solely for informational purposes.
3. *See* N.J.A.C. 11:2-29.1 *et seq.*
4. *See* N.J.A.C. 11:2-29.2.
5. *See* N.J.A.C. 11:2-29.3(f).
6. N.J.A.C. 11:2-29.2.
7. *Id.*
8. *See* N.J.A.C. 11:2-29.3(a) which provides the Commissioner discretion to allow a withdrawing insurer to file a "reasonable substitute withdrawal procedure approved by the Commissioner."
9. *See* N.J.A.C. 11:2-29.4 for particular requirements.
10. The reference to life and health, and annuity business is surprising in view of the historical position of the Commissioner's staff that the withdrawal laws do not apply to such business.
11. *See* Note 10.
12. N.J.A.C. 11:2-29.4.
13. N.J.A.C. 11:2-29.3(c).
14. Different states have different withdrawal-related triggers for amendment of a Certificate. In Florida, for example, an insurer's failure to have or renewal premium income for one calendar year in a type of business which has a separate line on the insurer's National Association of Insurance Commissioner ("NAIC") Annual Financial Statement, requires an amendment of a certificate of authority. In Connecticut, Delaware, New Jersey, New York and Ohio, amendment might be required during withdrawal, depending upon the insurers and business in question. In Georgia, Idaho, Minnesota, New Hampshire, North Carolina and Virginia, Insurance Departments are authorized to require additional action for information from a withdrawing insurer once that insurer has notified the Commissioner of an intent to withdraw, and such "additional information" conceivably might include amendment of a Certificate. Also, if it finds that an insurer is withdrawing from transacting a "line of business" in Ohio, the Ohio Commissioner will require amendment of the insurer's Certificate to reflect such withdrawal. We understand from "no names" discussions with the Ohio Department staff that requirement is not codified, but rather exist as a Department Procedure. The Delaware, Minnesota and Texas Departments also require such amendment upon a similar filing.

In the context of a withdrawal, there is a distinction between the formal filing of a withdrawal plan and the mere provision of notice. There are only fourteen states with a formal withdrawal plan filing requirement, i.e., Colorado, Florida, Maine, Maryland, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington and West Virginia.

15. N.J.A.C. 11:2-29.3(f).

16. The eleven additional states that have notice requirements are Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Louisiana, Minnesota, New Hampshire, Utah and Virginia. Of these eleven states, only four have codified the notice requirement. *See* Ark. Code. Ann. § 23-63-211(e); Idaho Code § 41-18-41(1); Ill. Reg. Stat. ch. 215 para. 5/1/43.11(a); and Utah Code Ann. § 31A-14-213(1).