

FEDERATION OF REGULATORY COUNSEL, INC.

**FLORIDA STATE AND FEDERAL COURTS IMPOSE POLICY FORM
REVIEW AND APPROVAL REQUIREMENTS ON SURPLUS LINES
INSURERS**

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Surplus lines insurance covers a risk that admitted or authorized insurers are unable or unwilling to insure due to the nature of the risk. Because surplus lines insurers provide coverage for risks where admitted or authorized carriers are unwilling to take on risk, state insurance regulations are less onerous on surplus lines insurers, including in the area of policy forms and rates that otherwise must be approved by the state. However, opinions issued by the Florida Supreme Court and the Eleventh Circuit Court of Appeals may now result in surplus lines insurers being subject to greater regulation in Florida in the area of policy form review and approval requirements.

Essex Ins. Co. v. Zota ("Zota"),¹ originally commenced as a negligence suit filed in Florida state court against a commercial property owner and a general contractor by an individual injured while painting at the property construction site. Essex Insurance Company ("Essex"), the surplus lines insurer that insured the commercial property owner, filed a declaratory action in federal district court seeking a determination of its rights and obligations to the parties in the state negligence action. The federal district court entered a summary judgment declaring that Essex was precluded from denying coverage because it failed to deliver the policy to the insured, as required by sections 626.922 and 627.421, Fla. Stats.² Thereafter, plaintiffs filed a motion for attorneys' fees against Essex pursuant to section 627.428, Fla. Stat., which the federal district court granted.³

Essex then appealed the two federal district court orders entered in *Zota I* to the Eleventh Circuit Court of Appeals, which in turn certified to the Florida Supreme Court five questions of Florida law that it viewed unanswered by existing Florida precedent.⁴ Of the five questions certified by the Eleventh Circuit Court of Appeals in *Zota II*, the Florida Supreme Court answered only one:

Whether Fla. Stat. § 626.922 or § 627.421, or both, require delivery of evidence of insurance directly to the insured, so that delivery to the insured's agent is insufficient.

In selecting the above-referenced certified question, the Florida Supreme Court in *Zota* observed that the federal district court appeared to have based the entry of its summary judgment upon an interpretation of sections 626.922 and 627.421, Fla. Stats., that would alter the prior precedent in this area. Specifically, the Florida Supreme Court noted that the federal district court held that these statutes abrogated Florida's long-standing common-law agency rules by placing an affirmative duty upon a surplus lines insurer or its direct surplus lines agent to deliver a copy of a surplus lines insurance policy directly to the insured, notwithstanding the successful delivery of the relevant policy to the representative of the insured, who was acting as an insurance broker in this particular transaction.⁵ The Florida Supreme Court further observed that as a result of the entry of the summary judgment, the federal district court did not examine or develop many of

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the factual issues implicated by the Eleventh Circuit's certified questions and, instead, simply estopped the surplus lines insurer from relying on the language of the relevant policy exclusions.⁶

In answering the above certified question in *Zota* in the negative, the Florida Supreme Court began its analysis by construing the scope of Chapter 627, Fla. Stat., because it believed that a number of issues in the case depended on provisions contained in that chapter. However, none of these issues included the requirements of section 627.410, Fla. Stat., concerning filing and approval of policy forms. Essex asserted that surplus lines insurers were exempt from Chapter 627 in its entirety because section 627.021(2)(e), Fla. Stat. provided that "[T]his chapter does not apply to . . . [s]urplus lines insurance placed under the provisions of ss. 626.913-626.937." However, the Florida Supreme Court viewed Essex's interpretation of section 627.021(2)(e), Fla. Stat. as too literal and narrow, noting that if followed, such an interpretation would render provisions of Part I's scope meaningless, a disfavored result under established rules of statutory construction.

To bolster its view that Essex's position was incorrect, the Florida Supreme Court reaffirmed its opinion in *Nat'l Corporacion Venezolana, S.A. v. M/V Manaure V*,⁷ that section 627.021(2), Fla. Stat., applied only to Part I of Chapter 627. In *Manaure V*, the Florida Supreme Court examined whether section 627.021(2), Fla. Stat., excluded marine insurance from then section 627.7262, Fla. Stat. The court determined that the statute's usage of the phrase "[t]his chapter does not apply to," was a scrivener's error made by the Statutory Revision Department when preparing Florida's newly enacted Insurance Code for placement in Florida Statutes, and that the Legislature actually intended to refer to Part I of Chapter 627, the "Rating Law," and not the entire Chapter 627. In applying *Manaure V* to *Zota*, the Florida Supreme Court asserted that the Legislature must have intended to exclude surplus lines from only Part I of Chapter 627, Fla. Stat., because it amended section 627.021(2), Fla. Stat., to include surplus lines after the *Manaure V* decision, and the Legislature was presumed to have known the existing judicial construction of that provision prior to amending Section 627.012(2), Fla. Stat.

Approximately one month after the Florida Supreme Court's decision in *Zota*, the Eleventh Circuit Court of Appeals issued an opinion in *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Company*, which for all practical purposes extends *Zota's* holding.⁸ The issue before the Eleventh Circuit was whether the surplus lines excess carrier, which had provided an additional \$10 million in coverage in excess of the underlying admitted carrier's policy must reimburse CNL for \$5.5 million which CNL paid to the plaintiff in attorneys' fees. The underlying coverage issued by the admitted carrier contained a disputed endorsement form ("Endorsement 17"), which the district court determined excluded coverage under that policy. The district court granted summary judgment in favor of the surplus lines insurer.

However, the district court's summary judgment order was reversed by the Eleventh Circuit because it determined that the district court had not resolved the factual question of whether Endorsement 17 was filed with the Florida Office of Insurance Regulation pursuant to section 627.410, Fla. Stat. The Eleventh Circuit determined that the district court erroneously interpreted section 627.021(2)(e), Fla. Stat., to exclude surplus lines from all of Chapter 627, including section 627.410, because *Zota* had recently rejected that interpretation.

Like *Zota*, *CNL Hotels* did not discuss or analyze Florida's Surplus Lines Law. Furthermore, *CNL Hotels* did not discuss or analyze the issue that the key exclusionary language contained in Endorsement 17 only appeared in the underlying insurance policy issued by an authorized insurer subject to the form filing requirements of section 624.410, Fla. Stat., and not that of the surplus lines insurer.

To date, the Florida Office of Insurance Regulation has not issued any orders, bulletins or memoranda regarding the applicability of section 627.410, Fla. Stat. to surplus lines policy forms. However, the Florida Office of Insurance Regulation did file an amicus brief in *CNL Hotels* in support of Appellees' Motion for Rehearing.⁹

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In its brief, the Florida Office of Insurance Regulation asserted that section 627.410, Fla. Stat., was inapplicable to surplus lines insurers because surplus lines was regulated by the Florida Surplus Lines Law, which is part of Chapter 626, Fla. Stat. One of the purposes of the Surplus Lines Law is to:

[P]rotect such authorized insurers, who under the laws of this state must meet certain standards as to policy forms and rates, from unwarranted competition by unauthorized insurers who, in the absence of this law, would not be subject to similar requirements.... 10

The Florida Office of Insurance Regulation also asserted that two statutory provisions requiring approval of surplus lines policy forms demonstrated the Legislature's intention for a general exemption of surplus lines insurers from form filing and approval requirements applicable to admitted insurers under section 627.410, Fla. Stat. Section 626.916(1)(c), Fla. Stat., requires form approval where the coverage is to be exported under a unique form of policy designed for use with respect to a particular subject of insurance if a copy of such form is filed with the Florida Office of Insurance Regulation by the surplus lines agent desiring to use the same, and is subject to the disapproval of the office within 10 days of filing such form. Section 718.111(11)(a)2, Fla. Stat., requires surplus lines insurers to file policy forms and rates when it seeks to issue a group insurance policy covering condominium associations.

It is very likely that legislation exempting surplus lines from policy form filing and approval requirements of section 627.410, Fla. Stat., will be filed in anticipation of Florida's 2009 Regular Session, which commences in early March 2009. Drafters of such proposed legislation should take into account that, notwithstanding the few occasions where surplus lines insurance carriers are explicitly made subject to particular statutory sections within Chapter 627 or are explicitly mentioned in a particular section,¹¹ the terms "insurer" and "authorized insurer" are used throughout Chapter 627, Fla. Stat. and unless otherwise defined, the term "insurer" may include a surplus lines insurer.¹² For example, section 627.428, Fla. Stat., an attorneys' fee provision for policyholders that successfully sue on insurance contracts, applies to surplus lines insurers, though there is no mention of surplus lines insurers.¹³ Another example is section 627.7019, Fla. Stat. regarding standardization of requirements applicable to insurers after natural disasters. This statutory provision only refers to "insurers"; but it applies to surplus lines insurers.¹⁴ Therefore, any proposed legislation, if not carefully drafted, may create more uncertainty about the applicability of Chapter 627 to surplus lines insurers, rather than resolving the current ambiguity in surplus lines regulation in Florida created by the *Zota* and *CNL Hotel* opinions.

Endnotes

1. 985 So. 2d 1036 (Fla. 2008).
2. §626.922, Fla. Stat. is specific to surplus lines agents and surplus lines insurance policies.
3. *See Essex Ins. Co. v. Zota*, 18 Fla. L. Weekly Fed. D609, 2005 WL 2456860 (S.D. Fla. April 13, 2005), *final summary judgment granted*, 18 Fla. L. Weekly Fed. D611, 2005 WL 2456081 (S.D. Fla. June 2, 2005) (collectively "*Zota I*").
4. *See Essex Ins. Co. v. Zota*, 466 F.3d 981, 990 (11th Cir. 2006) ("*Zota II*").
5. *See Zota I*, 18 Fla. L. Weekly Fed. at D610.
6. *See id.* at D610-11.

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7. 511 So. 2d 968, 970-71 (Fla. 1987).
8. 291 F. App'x 220, 2008 WL 3823898 (11th Cir. 2008).
9. Appellees' Motion for Rehearing was ultimately denied by the Eleventh Circuit.
10. §626.913(2), Fla. Stat.
11. See §627.912, Fla. Stat. (surplus lines carriers to make certain reports regarding professional liability insurance on risks in Florida); *see generally*, §627.701(6)(d)4., Fla. Stat. (mentioning surplus lines carriers).
12. An insurer includes every person engaged as indemnitor or surety or contractor in the business of entering into contracts of insurance or annuity. See §624.03, Fla. Stat. An authorized insurer is one authorized by a certificate of authority issued by the Florida Office of Insurance Regulation to transact insurance in Florida. See §624.09, Fla. Stat.
13. See, e.g., *Underwriters at Lloyd's London v. Osting-Schwinn*, 545 F.Supp.2d 1261 (M.D. Fla. 2008); *Chacin v. Generali Assicurazioni Generali Spa*, 655 So. 2d 1162 (Fla. 3d DCA. 1995); *English & Am. Ins. Co. v. Swain Groves, Inc.*, 218 So. 2d 453 (Fla. 4th DCA 1969).
14. See Rule 69O-142.015(1)(a), F.A.C., which implements §627.7019, Fla. Stat.