Introduction

Insurance regulators have recently placed greater emphasis on achieving “contract certainty”, with a stated goal of avoiding disputes over the nature and scope of insurance coverage provided by a particular contract. This increased focus has resulted in written guidance from a number of different jurisdictions. This paper focuses on recent guidance from the New York Insurance Department (“the Department”), and briefly references similar guidance and principles from the United Kingdom and Bermuda. To date, there appears to be no formal guidance from any U.S. jurisdiction other than New York.

NEW YORK

Background

The New York Insurance Department (the “Department”) has issued two Circular Letters providing its guidance regarding contract certainty. First, on October 16, 2008, the Department issued Circular Letter 20 of 2008 (“CL 20 of 2008”) (link: http://www.ins.state.ny.us/circltr/2008/cl08_20.htm). The letter was intended to help insurance carriers, brokers and policy-holders avoid disputes over the nature and scope of insurance coverage provided. The Department issued a supplemental letter on February 17, 2010, entitled Supplement No. 1 to CL 20 of 2008 (“Supplement No. 1”) (link: http://www.ins.state.ny.us/circltr/2010/cl2008_20s1.htm), to provide further guidance regarding its position and expectations regarding contract certainty, and to alert insurers that it might issue letters of inquiry to determine how and to what extent companies had developed and implemented the practices set out in CL 20 of 2008.

Definitions and Application

CL 20 of 2008 defines “contract certainty” as the “complete and final agreement of all terms to an insurance policy or reinsurance contract by the date of inception, and the issuance and delivery of the policy or contract before, at, or promptly after inception.” CL 20 of 2008 focuses on those policies where, because of the unique nature or size of the risk, issues were most likely to surface, specifically naming policies issued to: (1) large commercial insureds, written on a manuscript basis; (2) the special risk market, written pursuant to Ins. Law Art. 63; (3) policyholders in the excess line market; and (4) other insurers via reinsurance.

CL 20 of 2008 states that insurers should strive for contract certainty in at least 90 percent of the policies that are not already subject to a more stringent requirement, for example, policies that are subject to prior approval of the Department.
CL 20 of 2008 directs insurers and producers doing business in New York, within no more than 12 months after the October 16, 2008 issue date of CL 20 2008, to develop and implement practices to assure that policy documentation is delivered to the insured in accordance with the circular letter. The letter mandates that any documentation practices developed by companies must comply with all New York statutory or regulatory provisions concerning the content, timing and delivery of insurance policies.

**Timing and Compliance**

CL 20 of 2008 states that all terms of a policy should be complete and finalized, memorialized, executed and provided to the insured before, at or promptly after inception, with “promptly” meaning 30 days. Supplement No. 1 clarified that “promptly” means 30 business days and that any extensions beyond 30 days should be documented by insurers and, if possible, “good cause” should be established to explain the delay.

Supplement No. 1 provides that it is incumbent upon the insurer and the producer to decide between themselves how to allocate the 30-day time period, and to recognize that in the event the time frames set forth in CL 20 of 2008 or Supplement No. 1 conflict with any other provision of New York Insurance Laws or regulations, New York laws and regulations control.

Supplement No. 1 also states that where a producer intermediates a transaction, the insurer should endeavor to deliver policy terms and conditions to the producer within 18 business days after policy inception to enable the producer to check the terms and conditions for accuracy, advise the policyholder, and meet with the insurer if necessary to assure finality; this schedule would leave the broker 12 business days to deliver the contract to the policyholder.

**Documentation**

The Department states in Supplement No. 1 that a number of queries it received focused on the policy documentation necessary for contract certainty. The Supplement stated that, “mindful of the global nature of the insurance industry,” the documentation principles and standards established in the U.K. and Bermuda (see brief summaries of the U.K. and Bermuda documents below) would act as a guide to the Department in evaluating the adequacy of documentation, to the extent that such standards were consistent with New York Insurance Law and regulations.

Additionally, Supplement No. 1 states that “policy documentation” should contain all agreed-upon terms of the contract and may include an insurance policy, binder of insurance, schedule of cover, signed contract wording, endorsement or a complete slip.

**UNITED KINGDOM**
In June 2007, the UK published a document entitled “UK Contract Certainty Code of Practice.” (link: [http://www.abi.org.uk/information/business/521.pdf](http://www.abi.org.uk/information/business/521.pdf)) The 12-page publication is subtitled “Principles and Guidance.” The “Principles” section of the document offers an overview of the purposes and application of “contract certainty.” The “Guidance” section provides the legal perspective on the principles and step-by-step direction for companies. It advises insurers on what to do before and after entering into a contract, how insurers can demonstrate that the terms have been clearly expressed, that they have provided proper documentation, including the prompt documentation of contract changes, and how documentation should be handled where more than one insurer is on the risk. Additionally, the “Guidance” section advises on actions the broker and the insurer must take if the contract at issue has not met the guidelines. The appendices offer direction on how to express the subjective terms of a contract as unambiguous conditions, provide a checklist against which companies can check their compliance, and publish model signing provisions for use where there is more than one insurer.

**BERMUDA**

In 2007, Bermuda regulators published a document entitled, “Contract Certainty Code of Practice - Guidelines.” (link: [http://www.abir.bm/downloads/032208_ContractCertaintyCode of PracticeforBD FINAL.pdf](http://www.abir.bm/downloads/032208_ContractCertaintyCode of PracticeforBD FINAL.pdf)). The document purports to “assist ABIR and BIRBA members [to] achieve and monitor contract certainty.” Offering the same type of information as the U.K. publication, this 4-page document provides definitions of terms, steps for companies to take before and after entering into the contract, how insurers must demonstrate their performance in terms of compliance, what to do when the contract at issue has not met the principles, and a checklist for compliance. The paper states that “[i]t is hoped that there will be a high level of compliance with this Code of Practice at the July 1 2008 renewals with over 90% of contracts written in Bermuda meeting the following definition of contract certainty at 1 January 2009.”