Testimony of

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Before the Joint Standing Committee on Health Coverage, Insurance & Financial Services, In Opposition to LD 984, An Act to Allow Procurement of Surplus Lines Insurance for Commercial Forestry and Construction Equipment

Thursday, April 1, 2021

Senator Sanborn, Representative Tepler and members of the Joint Standing Committee on Health Coverage, Insurance & Financial Services, my name is Dana Doran, and I am the Executive Director of the Professional Logging Contractors of Maine. The Professional Logging Contractors of Maine (PLC) is a trade association that represents logging and trucking contractors throughout the state of Maine. The PLC was formed in 1995 to give independent contractors a voice in a rapidly changing forest industry.

As of 2017, logging and trucking contractors in Maine employed over 3,900 people directly and were indirectly responsible for the creation of an additional 5,400 jobs. This employment and the investments that contractors make contributed $620 million to the state's economy. Our membership, which includes 200 contractor members, directly employs 2,500 individuals who work in this industry and is also responsible for 80% of Maine's annual timber harvest, which equates to more than 9 million tons of wood annually.

Thank you for providing me the opportunity to testify on behalf of our membership in opposition to LD 984, An Act to Allow Procurement of Surplus Lines Insurance for Commercial Forestry and Construction Equipment. We respect the sponsor's intent with this legislation, but this is not a policy change that any of our members requested. Further, it would ultimately harm every one of our members at a time when they cannot afford any other cost increases and would only benefit surplus lines insurers that operate outside the regulatory authority of the state of Maine. Simply put, not only is this bill unnecessary it will ultimately harm the consumer by removing consumer protections which are so critical to Maine's small business community.

The forest industry was in the midst of a comeback until the onset of COVID 19 and the digestor explosion at the Jay mill in April 2020. As a result of mill closures and curtailments due to COVID 19, it led to a 30% reduction in harvesting capacity and the layoff of nearly 1,000 people in harvesting and hauling. This means that over 11,000 truckloads of wood were not delivered to a Maine mill in 2020. Further, for an industry that is responsible for over $620 million of direct economic impact each year, it will mean a direct loss of over $186 million of economic activity as a result.

I provide all of this context because 100% of our membership are small businesses who are fighting for their lives right now. LD 984 will not help these small businesses fight through this challenging time and it could make their businesses even less profitable as a result.

As I mentioned before, the PLC represents 200 logging and trucking contractors in Maine, including 41 companies in Senator Jackson's district. When this bill was introduced, I surveyed our entire membership to see if this bill would help them in any way. Not one company stated that there was a problem that this bill would fix and did not see any need for it.

Of our 200 members, 179 are currently insured by seven admitted carriers in the state. Of those that have been placed in surplus lines, they are there because they were not able to obtain coverage through an admitted carrier because of their loss history.

As you may know, Maine Bureau of Insurance Bulletin #439 (attached) states that, "placing coverage in surplus lines should always be the exception and not the rule. The Bureau of Insurance does not license surplus lines carriers. These carriers are exempt from most of the Insurance Code's consumer protections, and do not participate in guaranty associations that protect policyholders if an insurer becomes insolvent." Additionally, surplus lines are generally more expensive for the consumer because they are the insurer of last resort for high-risk companies. If a consumer cannot get a quote from an admitted carrier, a surplus lines company can provide a quote. Changing state law at this point will not serve any purpose other than to benefit the surplus lines insurer.

I can also tell you that from our membership's perspective, their experience with surplus lines has not been positive. Several who experienced an equipment loss were not able to get those losses paid because the company either filed for bankruptcy or would not honor the policy and there was no claim guarantee fund requirement that the surplus lines company had to contribute to. In the end, the logging company was left with the bill and no opportunity for recourse.

As an example of how beneficial it is to have admitted carriers invested in the state of Maine, especially in this industry, which is very capital intensive, I would like to reference a program that our organization put in place with the assistance of Acadia Insurance over 20 years ago.

The PLC Safety Dividend Program, which was filed with the Maine Bureau of Insurance in 1998, created a teamwork approach between an admitted carrier, insurance agents and logging companies to lower risk and reward good performance on a voluntary basis. In 1999, logging companies were struggling to lower their risk and maintain profitability as the industry was migrating from a conventional industry to a mechanized industry, insurance losses were mounting and there was extreme volatility in the insurance marketplace.

As part of this program, a safety committee was created to help guide logging companies and focus on loss reduction. In 2010, a full suite of annual safety trainings was instituted to help logging companies reduce losses and help with their overall profitability. This program has been an overwhelming success. The loss ratio for our members that participated in this program between 1999 and 2003 averaged 61% annually and for the most recent five-year period from 2016-2020 it was now down to 27.8%. Additionally, there are now over 1,000 individuals who participate in these trainings annually and the program has returned over $10 million in premium to our members over the last twenty years as a reward for lowering their losses. This program would not exist if there was no difference between surplus lines insurers and those that are admitted because the lowest cost and least amount of coverage would dominate the marketplace.

As I stated previously, this legislation was not requested by our membership, which represents over 50% of the contractors in the state, 65% of those employed in the industry and 80% of the wood that is harvested. If this legislation became law, it would reduce coverage, increase risk and lower profitability for every contractor in the state at a time that they can least afford this type of volatility.

Again, I am respectful of the sponsor, however this is not a productive piece of legislation, and it will not help our industry in any way. I encourage you to vote ought not to pass on LD 984 and I would be happy to participate in the work session and answer any questions you might have.

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Bulletin 439

Placement of Insurance in Surplus Lines Market

(Supersedes Bulletins 328 and 414)

This Bulletin replaces Bulletins 328 and 414. It explains the conditions under which a risk may be placed in the surplus lines market and addresses a 2019 change to the Maine Insurance Code which allows disability insurance to be placed in surplus lines subject to the statutory requirements outlined in this Bulletin.[1]

Producers should keep in mind, as a matter of professional competence,[2] that placing coverage in surplus lines should always be the exception, not the rule. The Bureau of Insurance does not license surplus lines carriers. These carriers are exempt from most of the Insurance Code's consumer protections, and do not participate in the guaranty associations that protect policyholders if an insurer becomes insolvent. The Insurance Code provides clear rules for producers to follow in determining whether to place coverage in surplus lines:

- Life insurance, health insurance (except disability insurance), and employee benefit excess ("stop-loss") insurance;[3] reinsurance;[4] and workers' compensation[5] insurance may not go into surplus lines.
- Motor vehicle insurance should not generally go into surplus lines because an assigned risk market is available.[6]

For other risks, the following conditions apply:

- The insurance must be procured through a licensed producer with surplus lines authority.
- The coverage must be necessary for the adequate protection of a risk in this state. This requires the producer to review the needs of the particular risk. If adequate protection is available in the admitted market, then the producer may not place the risk in the surplus lines market.
- The coverage must be one that an authorized insurer may write.

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[1] P.L. 2019, Ch. 20 (L.D. 260), effective April 5, 2019, *amending* 24-A M.R.S. § 2002-A(1)(B)
[2] 24-A M.R.S. § 1420-K(1)(H)
[3] 24-A M.R.S. § 2002-A(1)
[4] 24-A M.R.S. § 2002-A(2)
[5] 39-A M.R.S. § 102(14)
[6] 24-A M.R.S. § 2325

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- The producer must have made a diligent effort to place the coverage with authorized insurers.[7] This is not a mechanical exercise. Therefore, doing a specific number of inquiries does not mean that the producer has fulfilled this requirement. Rather, this is a function of many variables, including for example the type of insurance sought and the coverage limits needed. The diligent effort requirement does not end when coverage is placed in surplus lines. At renewal, the producer should investigate whether circumstances exist, such as improved loss history or improved market conditions, which favor returning the risk to the admitted market.

These conditions are cumulative; therefore, all of them must be met before the risk may be placed outside of the admitted market.

Other considerations apply to the decision to place coverage in surplus lines:

- Surplus lines coverage is often more expensive than comparable coverage in the admitted market. However, sometimes a surplus lines insurer might offer similar coverage terms at a lower premium than an authorized insurer would. This is not a reason to place the risk in the surplus lines market.
- A producer may not place a risk in the surplus market if the desired coverage exists in the admitted market. The test under Section 2004 is whether admitted coverage is available to the insured, not whether it is available to a particular producer. An admitted carrier's decision not to deal with a producer does not give that producer preferential access to the surplus lines market.
- The desired coverage must be in a line of business that an authorized insurer may lawfully write. The producer must make a diligent effort to place the coverage in that market. If the producer does not have appointments with any insurers that offer the desired coverage, and wishes to compete for the account, the first step to fulfill the diligent effort requirement must be to seek the necessary appointment or to place the coverage through an appointed producer.
- The admitted market is available even if a producer is blocked from placing an account with an authorized insurer because the account has a relationship with that insurer. In such cases, unless the requirements of Section 2004 are otherwise met, the coverage must remain in the admitted market, and the producer must obtain a broker of record letter in order to represent that account. A potential client's reluctance to sign a broker of record letter does not make admitted market coverage unavailable.
- The admitted market is available even if a producer loses its appointment with the authorized insurer, and the insurer is willing or, as in the case of personal property and casualty coverage, required to retain the insured. Bulletin 391, Personal Lines Agency Terminations and Book Rollovers, explains how producers and insurers should handle these terminations.

[7] 24-A M.R.S. § 2004. Producers may place some coverages in surplus lines without adhering to the diligent effort requirement. These coverages are wet marine and transportation insurance, insurance on out-of-state risks, and insurance on interstate railroad and aircraft operations. See 24-A M.R.S. § 2002-A(3) for more details. Liability insurance purchased through a risk purchasing group is also exempt from this requirement. See the Maine Liability Risk Retention Act, 24-A M.R.S. §§ 6091 – 6104. Last, the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRA") exempts placement of coverage for exempt commercial purchasers under some circumstances. See Bulletin 378, Changes to the Nonadmitted Insurance Laws, for more information.

- Producers may place disability insurance coverage in surplus lines, subject to the same restrictions that apply to all other surplus lines placements. Producers should seek admitted market coverage and, if necessary, may look to surplus lines carriers for coverage in excess of that provided by the admitted market. Only in the case of a risk that will not be written by admitted market carriers (*e.g.*, due to the insured's profession) may a producer place the entire risk into surplus lines.

Last, the Superintendent reminds producers of other matters relevant to the surplus lines market:

- If the Superintendent determines, after a hearing, that a line does not have a reasonable or adequate market, the Superintendent may issue an order exempting that line from the diligent search requirement.[8] As of the date of this Bulletin, no lines are declared eligible for surplus lines placement ("eligible for export") by order of the Superintendent.
- Although surplus lines insurers are, by definition, not licensed in Maine, they do need to be eligible under the surplus lines law.[9] The status of eligibility is not a license to transact insurance in Maine. Eligibility indicates that the insurer appears to be sound financially and to have satisfactory claims practices, and that the Superintendent has no credible evidence to the contrary. A producer may not knowingly place surplus lines insurance with a financially unsound or ineligible insurer. A current list of eligible surplus lines insurers is available through the Bureau's license portal at http://www.state.me.us/pfr/insurance/license_search.htm.
- Upon placing surplus lines coverage through a producer with surplus lines authority, a producer must promptly issue and deliver evidence of the insurance to the insured: either the policy issued by the insurer or, if the policy is not available, the surplus lines producer's certificate.[10]
- Each surplus lines policy must display the name of the surplus lines producer who procured the policy and the following notice:

  > This insurance contract is issued pursuant to the Maine Insurance Laws by an insurer neither licensed by nor under the jurisdiction of the Maine Bureau of Insurance.[11]

  The Superintendent interprets this in part to be a warning to the policyholder that the insurer does not participate in MIGA and that, should the surplus lines insurer become insolvent, MIGA will not pay the insurer's losses.
- Producers must keep "a full and true record" of each of their surplus lines placements.[12] Paragraphs 2015(1)(A) through (H) list specific items that the record must include. Paragraph 2015(1)(I) allows the Superintendent to require other information. As of the date of this Bulletin, the Superintendent expects producers also to document thoroughly the basis for each surplus lines placement, including renewals of existing policies. The record should explain how the placement qualifies for export under Section 2004.
- Surplus lines producers must keep monthly reports of their surplus lines transactions. Producers must keep these reports in their offices and provide them upon the Superintendent's request.[13]

[8] 24-A M.R.S. § 2006
[9] 24-A M.R.S. § 2007
[10] 24-A M.R.S. § 2008
[11] 24-A M.R.S. § 2009
[12] 24-A M.R.S. § 2015
[13] 24-A M.R.S. § 2016

- Surplus lines premiums are subject to a 3% premium tax. The surplus lines producer is responsible for remitting this tax to Maine Revenue Services.[14] More information regarding this tax and the applicable procedures and forms is available directly from Maine Revenue Services at this link: http://www.state.me.us/revenue/.

The Superintendent expects that producers will comply with the Surplus Lines Law and the standards announced in this Bulletin. Any producer who has moved coverage from the admitted market to surplus lines should review carefully – and thoroughly document its review – whether the coverage should return to the admitted market at the policy's next renewal. Producers who fail to do so may be subject to disciplinary action.

November 26, 2019

Eric A. Cioppa
Superintendent of Insurance

NOTE: This Bulletin is intended solely for informational purposes. It is not intended to set forth legal rights, duties, or privileges, nor is it intended to provide legal advice. Readers should consult applicable statutes and rules and contact the Bureau of Insurance if additional information is needed.

[14] 36 M.R.S. § 2531(2)