



## National Association of Professional Surplus Lines Offices, Ltd.

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Richard M. Bouhan  
Executive Director

February 26, 2010

Mr. John W. Bauer  
Chief Counsel, Regulatory Affairs  
National Association of Insurance Commissioners  
2301 McGee Street, Suite 800  
Kansas City, Missouri 64108

**RE: NAIC NARAB Working Group**

Dear Mr. Bauer:

I am writing from the National Association of Professional Surplus Lines Offices, Ltd. (NAPSLO) regarding the survey with answers from the Mississippi Department of Insurance. The survey concerns the "NARAB Working Group Reciprocity Checklist." The question that we would like to discuss is the one regarding the need for the surplus lines agent to do the diligent search. NAPSLO members are wholesale surplus lines brokers, so they act as an intermediary between the independent agent (typically) and the surplus lines company. They do not perform the diligent search because the retail (independent) agent already did so. It would be a waste of time for the surplus lines wholesale broker to conduct a diligent search, particularly when the expert on admitted markets (the independent agent) already did a diligent search.

Since they have to split a commission, pay a higher tax, and undertake additional compliance procedures (and possibly billing procedures) all of the incentives are for the retailer agents to use their retail markets rather than engage a surplus lines wholesaler. Retail agents will call a surplus lines wholesale broker only after they have been unable to find an admitted market for their risk.

With respect to Mississippi, since the state requires the retail agent to have a surplus lines broker's license, the survey response does not mean that a wholesaler must conduct the diligent search. Because the retailer (with a surplus lines license) conducts the diligent search, the retailer would fill out the affidavit. The state may elect to allow the wholesaler to fill out the affidavit, but they do not require the wholesaler to conduct a second diligent search. Mississippi only requires one diligent search and is aware that the retail agent conducts the diligent search when the transaction involves a wholesaler.

I can see why the DOI answered the question the way they did given the wording of the statute (83-21-23):

*When an policy of insurance . . . is procured under the authority of such license, there shall be executed by the agent an affidavit setting forth facts in complete detail as to what was done to place such kind of insurance and showing that such agent therein was unable, after diligent effort, to procure from any licensed company or companies the full amount of insurance required to protect the company. . . .*

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*The commissioner of insurance may promulgate rules and regulations and establish appropriate fees for the implementation of sections 83-21-17 through 83-21-31.*

In the case of Mississippi the question would have needed to ask who conducts the diligent search when a surplus lines wholesaler is involved in the transaction. My understanding is that they would acknowledge that the retailer would conduct the diligent search and the wholesaler would not be required to conduct a second diligent search. The question is a little confusing as applied to Mississippi because the retail brokers in Mississippi are required to have a surplus lines broker's license.

The vast majority (perhaps all) of states specifically allow the wholesaler to rely upon the diligent search conducted by the retailer. Many states clarify this by issuing a FAQ—a bulletin or a regulation stating that a surplus lines wholesaler may reasonably rely upon the diligent search undertaken by the licensed retail agent. Many states also clarify this in the affidavit forms. A few allow this practice without clarifying the matter in their printed materials, although that is not recommended. In the case of Mississippi, the brokers are aware that the retail agent would conduct the diligent search and complete the affidavit. The affidavit and the instructions (and the survey response) are more easily understood in light of the fact that the retailers are required to have a surplus lines license.

The Mississippi Surplus Lines Association instructions mention a "producing agent" which in other states is a term used to refer to the retail agent. As applied, I believe the state intended the term "producing agent" to mean the retail agent in a transaction involving a surplus lines wholesaler. The producing agent is the retailer that completes the affidavit.

Thank you for the opportunity to comment. Please let me know if you have additional questions.

Yours truly,

A handwritten signature in cursive script that reads "Steven P. Stephan".

Steven P. Stephan, J.D., CPCU, ARe  
Director of Government Relations