



National Association of Professional Surplus Lines Offices, Ltd.

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Richard M. Bouhan
Executive Director

May 10, 2010

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

RE: Oregon NARAB Questionnaire

Dear Mr. Bauer:

NAPSLO would like to comment about the Oregon NARAB Working Group Reciprocity Checklist responses. The responses indicate that an underlying non-resident P&C license is required as a precondition for obtaining a non-resident surplus lines broker's license. We believe the legislature intended to address this issue in Section 735.450 where it outlined the requirements for obtaining a non-resident surplus lines agent's license.

735.450 Requirements for license as surplus lines insurance licensee. (1) A person shall not procure any contract of surplus lines insurance with any nonadmitted insurer unless the person is licensed under ORS chapter 744 to transact surplus lines insurance. A person may obtain a license to transact surplus lines insurance only if the person is licensed as an insurance producer under ORS chapter 744 to transact property and casualty insurance.

(2) The prohibition in subsection (1) of this section does not apply to a nonresident surplus lines licensee or to a nonresident surplus lines insurance producer who is not a licensee in this state if:

(a) The insurance contract covers a risk with exposures both in this state and outside this state;

(b) Procurement of the insurance contract described in paragraph (a) of this subsection did not occur in this state; and

(c) The licensee or insurance producer is licensed to transact surplus lines insurance in the state in which the insurance contract described in paragraph (a) of this subsection was procured. [1987 c.774 §127; 1989 c.288 §1; 1991 c.810 §26; 1995 c.639 §14; 2001 c.191 §46; 2003 c.364 §41]

The legislature intended to directly address the non-resident surplus lines broker requirements by indicating that a non-resident surplus lines broker can obtain a license without a license under Chapter 744. We believe Section (2) should have resulted in the Oregon response to Question 4.a being that a non-resident surplus lines broker is not required to have an underlying non-resident P&C license. It provides that "the prohibition in Subsection (1) does not apply to a nonresident surplus lines licensee." We believe the legislature intended to address non-resident licensing for surplus lines brokers and that they did not intend to require a non-resident P&C license as a precondition for a non-resident surplus lines license.

A separate question in Part 4 of the survey is whether the surplus lines broker is required to perform a diligent search. It may be unnecessary for the purposes of the NARAB Working Group to address the diligent search issue since the state has already decided that an underlying non-resident P&C license is not needed for a non-resident surplus lines license. Nevertheless, NAPSLO would like to comment on Oregon's response to Question 4(c) because we believe that a surplus lines broker is not required to perform the diligent search unless the broker is also the producing broker (and therefore the only licensed producer in the transaction).

The question and the response are as follows:

Is the surplus lines producer required to perform the diligent search of the admitted market in your state?

Yes ___ X ___ No _____ Citation: ORS 735.425

Oregon Section 735.425 specifically requires the producing broker to complete the diligent search. In a transaction involving a surplus lines wholesale broker, the "producing broker" is the retail broker. Of course, in a retail surplus lines transaction, the producing broker is the only producer in the transaction so the retailer is obviously considered to be the "producing broker." Section 735.425 provides:

735.425 Filing by licensee after placement of surplus lines insurance; rules. (1) Within 90 days after the placing of any surplus lines insurance in this state, each surplus lines licensee shall file with the Director of the Department of Consumer and Business Services:

(a) A statement signed by the licensee regarding the insurance, which shall be kept confidential as provided in ORS 705.137, including the following:

...

(b) A statement on a standardized form furnished by the director, as to the diligent efforts by the producing insurance producer to place the coverage with admitted insurers and the results thereof. The statement shall be signed by the producing insurance producer and shall affirm that the insured was expressly advised prior to placement of the insurance that:

(A) The surplus lines insurer with whom the insurance was to be placed is not licensed in this state and is not subject to its supervision; and

(B) In the event of the insolvency of the surplus lines insurer, losses will not be paid by the state insurance guaranty fund.

(2) The director may direct that filings required under subsection (1) of this section be made to the Surplus Line Association of Oregon. The director may also require that such filings be made electronically but may exempt a licensee from the requirement for good cause shown.

(3) A nonresident surplus lines licensee or nonresident producing insurance producer not licensed to transact surplus lines insurance in this state who places a surplus lines policy on a risk with exposures located both in this state and outside this state shall satisfy filing requirements established by the director by rule. The director shall ensure that the rules facilitate interstate regulation of surplus lines insurance transactions.

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A diligent search is required, as it is in almost all states, but the statute is very clear in specifically requiring that a producing insurance producer conduct the diligent search. The statute requires that a diligent search is made, but is specific in identifying the retail agent as the one who should conduct the diligent search.

The wholesale surplus lines broker would normally rely upon the diligent search conducted by the retail agent. The retail agent is typically an independent insurance agent and typically does not have a surplus lines broker's license. The retail agent (in a wholesaler transaction) is the expert in the admitted markets. The surplus lines wholesale broker is an intermediary between the retail agent and the surplus lines company. The surplus lines wholesale broker is an expert in surplus lines markets and would have little or no contacts in the admitted markets. It would be an unnecessary waste of time for the surplus lines wholesale broker to conduct a second diligent search of the admitted markets, because the retail agent has already done so.

In a transaction involving both a retail broker and a surplus lines wholesaler, we believe the role of the surplus lines market as a supplemental market is better served if the retail broker is allowed to conduct the diligent search. For example, if a doctor had multiple claims during the year, the doctor may not realize there is no admitted market for his/her malpractice coverage until the retail agent has made a submission to the admitted markets. Only after the risk is declined by the admitted markets would the retail agent contact the surplus lines broker to make a submission in the surplus lines markets. The doctor could not know in advance that his coverage would be declined by the admitted markets so the doctor would not know to contact a surplus lines broker. Because the surplus lines market is intended to be a supplemental market, there are good reasons for the retail broker to search the admitted markets prior to contacting the surplus lines wholesaler.

Many states require the surplus lines broker to execute the affidavit even if the diligent search was conducted by a retail broker. Some states, such as Oregon require the retail broker to execute an affidavit regarding the diligent search.

We do not believe the statutory scheme intended for the surplus lines wholesale broker to conduct a second diligent search of the admitted markets. We wanted to address this issue because of the response to question 4.c addressed the issue. The question could have been more specific in distinguishing the requirements for a retail surplus lines broker and a wholesale surplus lines broker. We believe that a retail surplus lines broker must conduct a diligent search because they are the only producer in the transaction.

We believe it is in the best interest of the States, the NAIC, and NAPSLO to have as many states certified as reciprocal as possible. Great strides have been made in the area of reciprocal licensing and in this would be one more step in the direction of reciprocal licensing.

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If there is anything NAPSLO can do to further this overall objective, please let me know.

Yours truly,

A handwritten signature in cursive script that reads "Steven P. Stephan". The signature is written in black ink and is positioned above the printed name.

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