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UK, Bermuda and EU Markets: For US Business, Ditch Direct Procurement, Go Surplus Lines

There are appropriate times to utilize the direct procurement markets, but surplus lines is generally more legally compliant.

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It's a tale as old as time: A U.S. insurance broker wants to place bespoke coverage for its U.S. client. Sometimes, it's a layer within a commercial tower. Perhaps there are some participating admitted (licensed) U.S. carriers, mixed in with an array of eligible surplus lines insurers. But alas, satisfying all layers through the admitted and surplus lines markets proves allusive, so the broker approaches an unauthorized carrier in Bermuda, a European country, or another non-U.S. jurisdiction. It makes sense, right? The broker tried its best to find coverage another way, and it wants to do right by its client.

There is just one problem: the transaction often violates U.S. law. More particularly, the constitutional tenets of direct procurement (also referred in the U.S. as "direct placement" or "independent procurement") are, in reality, extremely proscriptive. By contrast, utilizing the excess and surplus lines insurance markets allows for seamless negotiation of insurance coverage with U.S. surplus lines producers and often provides a more legally compliant and business-friendly solution for insurance carriers, brokers and insureds. This article will identify the principal legal hurdles that a compliant direct procurement transaction must overcome while detailing the process to become an eligible U.S. surplus lines insurer and the advantages that come along with such designation.

The tenets of direct procurement are very restrictive and most international placements fail to meet the required standards.

Traditionally, there are two primary methods used to place insurance coverage in the United States: (1) the authorized (admitted and licensed) markets, and (2) the unauthorized markets served by eligible surplus lines insurers. A third, but less frequently utilized option is through the process of direct procurement. The right of a U.S. citizen to leave his, her or its state of residency to obtain insurance on a risk located in that state an unauthorized insurer was first enunciated by the United States Supreme Court in its landmark decision *State Board of Insurance v. Todd Shipyards Corporation*, 370 U.S. 451 (1962).

While a number of subsequent judicial decisions have distinguished Todd Shipyards, the current case law still protects a direct procurement transaction from most non-tax state insurance regulation, provided the following circumstances apply:

- The insured does not access the non-admitted insurer through a resident insurance agent, broker or surplus lines broker;
- There is no activity conducted by the non-admitted insurer in the state either in the making or in the performance of the contract; and
- The transaction occurs “solely” (or, in some states such as New York, “principally”) outside of the state where the insured is located.

These core tenets of direct procurement are still subject to strict enforcement in a number of jurisdictions. For example, in New York, pursuant to a publication by the Excess Line Association of New York entitled “INDEPENDENT / DIRECT PROCUREMENT: ELANY Says” (the “ELANY Publication”):

“The law of New York . . . establishes a **NARROW EXCEPTION** to the general requirements that an insurer be authorized (licensed) to sell insurance to New Yorkers or when insuring New York risks. . . . it is not sufficient for an insured to make direct contact from New York by phone or by mail with a London insurer or broker, but they literally must negotiate physically in the foreign location.” (Emphasis in original).

As another example, in Maryland, under *Meadowlark Insurance Company v. Insurance Commissioner of the State of Maryland*, 101 Md. App. 379 (1994), “[i]f the contract at issue has been preceded by *any* communication (e.g., letters, phone calls, telegrams, facsimile transmission, short wave radio etc., etc.), either originating in Maryland or received in Maryland . . . it is not entitled to [the direct procurement] exemption . . . .” (Emphasis in original).

Other states have similar guidance. In Wisconsin, under Wis. Stat. § 618.42, direct procurement is only permissible “if negotiations occur primarily outside this state. Negotiations by mail occur within this state if a letter is sent from or to an address in this state.” Accordingly, delivery of a policy into the state would appear to run afoul of Wisconsin law. In Michigan, under Mich. Comp. Laws § 500.402(b), transactions for which a license is not required include transactions under the surplus lines laws as well as the “[t]ransaction of insurance independently procured through negotiations occurring entirely outside of this state.” (Emphasis added).

The takeaway here is simple: absent certain exceptions, engaging in substantive discussions with insureds in the U.S. by unauthorized insurers or their local agents or brokers is not allowed. It does not matter if the broker takes a “back seat” to the transaction or that the insured initiates the conversations.

There are a few states that have express exceptions to the rigid tenets of direct procurement, including the “industrial insured” exemption where a handful of states indeed allow the insured to negotiate coverage from within its home state with an unauthorized insurer. However, such exception to the general rule is only available in a minority of states and, moreover, the insured must satisfy several established criteria to even qualify for such exception in the first place.

Broker involvement further complicates utilization of direct procurement and is generally not allowed.

What is also clear in many states is that an insured may not utilize an insurance broker to directly procure an insurance policy. Accordingly, unauthorized insurers are not only putting themselves at regulatory risk, but may also subject their U.S. broker counterparts to enforcement actions within the U.S. as well.

For example, under the ELANY Publication:

"[T]he purchase must be 'directly' or 'independently' procured. The words 'direct' or 'independent' mean the purchase of coverage without a broker or agent's involvement. . .. A broker cannot be involved at least not as a broker . . . . [A] broker [can] consult with the insured about options such as independent or direct procurement . . . as long as the consultant is licensed as a consultant in New York and is limiting their involvement to: 1. explaining why some capacity cannot be accessed from New York; 2. informing the client that the broker cannot act as a broker but only as a consultant regarding other potential available capacity; 3. not importuning a specific transaction with a specific carrier; and 4. not selling, soliciting or negotiating coverage."

As such, for a broker to be involved in a New York direct placement, not only does it need a separate consultant license, but it needs to steer clear of anything it would normally be capable of doing while wearing a broker hat, i.e., it cannot sell, solicit or negotiate the insurance coverage.

In California, per Surplus Lines Association of California Bulletin #1123 (March 19, 2007, the "CA Bulletin"), direct procurement transactions that have not been effectuated properly "expose [the broker] and the insurer [to] . . . [d]isciplinary action . . . ." With respect to insurers, the CA Bulletin notes that they can face "[e]nforcement action for transacting insurance in California" and "[p]ermanent disqualification" from placing coverage in the state.

The payment of fees to a broker in a direct procurement transaction is also seen as impermissible in California irrespective of whether the tenets of direct procurement are followed. Under the CA Bulletin:

"[I]t appears that certain insurance brokers located outside the United States have been advising that a surplus lines broker may export a risk to an alien [non-surplus lines eligible] insurer . . . [by] being compensated in the form of a 'consulting fee' paid by the offshore broker equal in amount to the brokerage commission the 'consultant' would receive if acting as a licensed surplus line broker for an authorized placement. Any such advice would be incorrect under California law." (Emphasis added).

Further illustrating that the intent of most states is to prohibit direct procurement transactions that do not abide by the required rigorous standards is that a few states do allow for such transactions if the surplus lines producer and nonadmitted insurer take many additional burdensome steps under applicable law. For example, in Florida, per Fla. Stat. § 626.918(5), if coverage eligible for export to the surplus lines markets is, in whole or in part, not available from an eligible surplus lines insurer after a search of such eligible surplus lines insurers, then the surplus lines agent may file with Florida Department of Insurance Regulation (the "FOIR") a signed statement indicating the coverages that will be placed with ineligible unauthorized insurers, including the amounts of coverage and percentages assumed by the nonadmitted insurer as applicable.

Such unauthorized insurer must, in addition, first deposit with FOIR cash or securities acceptable to FOIR a market value of $50,000 for each individual risk, contract or certificate, and the surplus lines agent shall procure from such unauthorized insurer and file with the FOIR a certified copy of the insurer's statement of condition as of the close of the last calendar year. Moreover, the policy itself must have specific disclosure language relating to the unauthorized, ineligible nature of the carrier. Accordingly, both the surplus lines agent as well as the unauthorized insurers have substantial compliance obligations to fulfill in such narrow instance before the tenets of direct procurement can be waived in a state like Florida.

The surplus lines insurance market provides substantially greater flexibility to carriers, brokers and

insureds.

The alternative is obvious: If you are an insurance carrier, become an eligible surplus lines insurer; and if you are a broker, place your coverage with a surplus lines carrier if possible.

Obtaining surplus lines eligibility is not as hard as many market participants may believe. Prior to 2010, insurance carriers needed to seek state-by-state eligibility to write on a surplus lines basis. However, after the passage of the Nonadmitted and Reinsurance Reform Act of 2010, the principal method to obtain nationwide U.S. eligibility is now via inclusion on the NAIC Quarterly Listing of Alien Insurers (the "Quarterly List"). As the name suggests, the Quarterly List is updated once per calendar quarter; however, if the application is prepared correctly, the NAIC usually can approve an applicant if the application is submitted at least one month in advance of the end of a calendar quarter.

Obtaining inclusion on the Quarterly List does come with a few significant hurdles. First and foremost, the insurance carrier must have at least $50 million in shareholders' equity. In addition, a trust account must be established in the U.S. for the benefit of policyholders in an amount of no less than $6.5 million that accordingly rises with surplus lines liabilities in the U.S. (although fortunately an evergreen letter of credit is a satisfactory asset for purposes of the trust). Moreover, every insurer must have a "U.S. representative". The U.S. representative tends to be selected from a small handful of law firms (such as ours) to handle, among other things, nationwide eligibility compliance and ongoing regulatory and data reporting considerations.

Some states still maintain surplus lines "eligibility" or "white" lists. Most non-U.S. surplus lines insurers obtain listing on most of these lists for a number of reasons. As an initial matter, while not legally required per federal law, some states still maintain that they have the right to "confirm" the insurer's surplus lines eligibility. Moreover, some states make the filing of state-specific data calls or the filing of surplus lines premium taxes by the broker difficult if the carrier is not on a state white list. In addition, surplus lines brokers often like to see carriers on these lists as a way for the broker to be confident that the surplus lines carrier is indeed eligible in the state and is generally considered reputable.

From a business perspective, utilization of the surplus lines markets makes the whole process much easier and more legally compliant. Surplus lines brokers can quickly and efficiently communicate with Bermuda, UK or EU counterparts and even be granted binding authority by the alien carriers, agents or coverholders. While surplus lines insurance marketing is somewhat restricted in a number of states, such restrictions pale in comparison to the direct procurement markets where an insurance broker can barely even whisper the availability of the coverage.

Final Considerations

The direct procurement market is enticing and well-developed. However, it operates in an area subject to very rigid regulatory standards. Insureds themselves must pay a direct procurement tax in most states, which means that such states will be aware of the transactions and will have the ability to scrutinize whether the tenets of direct procurement were followed. While there are certainly states that, in practice, do not focus their enforcement initiatives on these activities, others are increasing regulatory scrutiny in this area, especially as nonadmitted premiums continue to grow in the U.S.

This is why the surplus lines market exists in the first place. At its core, the U.S. does not want to exclude the international markets, but it needs to protect U.S. policyholders as well, and that is why there are robust eligibility standards for non-U.S. carriers wishing to operate in the excess and surplus lines markets. To allow for an insured or its broker to simply call or email an insurer or a broker in Bermuda, the UK, the EU or another non-U.S. jurisdiction without any regulatory consequence would render the surplus lines markets obsolete.

There are many valid reasons to utilize the direct procurement markets (including when a line of coverage may not be permissibly written on a surplus lines basis) and some structures, such as utilization of an attorney-in-fact in a local jurisdiction, can alleviate some potential insurance regulatory risk. Direct procurement, however, should not be seen or utilized as a readily available alternative to the excess and surplus lines markets.

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