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**Technical Advisory**

**TA 230**

**Date: October 24, 2003**

**SUBJECT: New LDI Surplus Lines Affidavit For Personal Lines Required**

**BACKGROUND:** The Louisiana Department of Insurance has released a new edition of the required Affidavit for Personal Lines coverages written in the surplus lines market.

The form replaces the previous (1999) edition, and should be used immediately. A copy of the new form is attached to this Technical Advisory. It can also be obtained from the Louisiana Department of Insurance website ([www.lidi.la.gov](http://www.lidi.la.gov)). The form is titled "Louisiana Department of Insurance – Form 1263.1 – Authorized Non-Admitted Affidavit," with an edition date of 2003 appearing in the lower right hand corner. Form 1263.1 is attached for your convenience, or can be found at the following LDI web link <http://wwwldi.lidi.state.la.us/Producers/taxes/surplusform1263.1Affidavit.pdf>.

**The statutory requirements for placing Personal Lines coverages in the surplus lines market have not changed. However, changes in the Affidavit were made to highlight the statutory duties of agents and brokers when placing coverages in surplus lines.**

**MAIN POINTS:** While the new form looks very similar to the previous one, a careful comparison will reveal some significant changes, and a few minor ones (such as the substitution of "approved unauthorized" for "unauthorized but approved" and "approved non-admitted").

The significant changes are found in the check-box section in the middle of the form. The change that has drawn the most attention is the newly added item which states: *"The company listed above met the requirements of L.R.S. 22:1262 the date coverage was procured."*

In the Louisiana Insurance Code, section 22:1262 sets forth the financial requirements for unauthorized (so-called "non-admitted") insurers. In addition to the financial requirements, 22:1262 requires that unauthorized insurers also must be on the "approved list" (often referred to as the "White List") of the Department of Insurance, as outlined in 22:1262.1. (There is an exception in 22:1262.H. for the use of unapproved

unauthorized insurers (who would not be on the “White List”), but only for certain commercial lines coverages. However, this practice is extremely dangerous from an E&O perspective.) The LDI surplus lines “White List” can be found on the IIABL website [www.iiabl.com](http://www.iiabl.com) front page “Quick Picks” or at the following LDI web link [http://www.lidi.la.gov/search\\_forms/white\\_list.cfm](http://www.lidi.la.gov/search_forms/white_list.cfm).

In addition, L.R.S. 22:1262.A. (1) provides that *“a surplus lines broker shall not knowingly place surplus lines insurance with insurers unsound financially.”*

The issue raised by the inclusion of the new check-box item on the Affidavit is this: Are the procuring producer/agent and surplus lines broker affirming that the Personal Lines coverages are being placed through a solvent and financially sound surplus lines insurer listed on the Affidavit? Answer: Yes.

However, it is not the new Affidavit that manifests this fact. This has been a statutory requirement for many years under the Louisiana Insurance Code, as referenced above. The Louisiana Department of Insurance elected to clarify this point while drafting a new Affidavit.

Jurisprudence on the duties of a procuring agent and surplus lines broker indicates some protection for agents and brokers who place surplus lines business only with insurers on the “approved list” (“white list”) of the Department of Insurance.

For agents, a key case is *Acadiana Shrimpers v. Phoenix Fire & Marine*, 640 So.2d 800 (La. App. 3 Cir. 1994), which held that “the procuring agent does not breach his fiduciary duty to the insured if at the time the coverage is placed, the insurer is still meeting its obligations and there was no evidence to indicate that the agent had reason to suspect or investigate the insurer’s financial status further.”

For brokers, the case *Popich Bros. Water Transport v. Gulf Coast Marine*, 705 So.2d 1267 (La. App. 4 Cir, 1998), writ denied, 717 So.2d 1166 (1998) held, “If a surplus broker knows that a nonadmitted carrier is unsound financially, then the broker may not place coverage with the insurer, but the broker’s only duty to investigate is the duty to ascertain that the insurer is on the Commissioner’s “white list” of approved nonadmitted insurers.”

The statutory requirement for the use of the Affidavit is in the Louisiana Insurance Code, section 22:1263.1. (which is where the Affidavit’s name of “Form 1263.1” originates). Up until 1999, the statute required use of an Affidavit for both Personal Lines and Commercial Lines written in the surplus lines market. However, in 1999, the law was amended to only require the Affidavit in Personal Lines placed through surplus lines.

Here is the current statute on the Affidavit requirement.

*§1263.1. Proof of uninsurability; affidavit*

*A. Any licensed surplus lines broker that procures a personal lines policy with an approved unauthorized insurer shall obtain from the duly licensed submitting agent or broker within thirty days of binding an affidavit on a standardized form promulgated by the commissioner of insurance which shall be maintained by the licensed surplus lines broker that attests to the diligent efforts of the agent or broker to place insurance coverage with admitted insurers and the results thereof. The affidavit shall affirm that the insured applicant for insurance was expressly advised prior to placement of insurance that the surplus lines insurer with whom the insurance is being placed is an approved unauthorized insurer, and that in the event of insolvency of the insurer, losses shall not be paid by the state insurance guaranty fund, and that the coverage is being procured through a duly licensed Louisiana surplus lines broker.*

*B. As long as the personal lines policy continues to be renewed by the same approved unauthorized insurer, there shall not be a need for new affidavits at each renewal. At renewal, if the personal lines policy is placed with a different approved unauthorized insurer, then the procurement of a new affidavit will be secured in the manner outlined in Subsection A of this Section.*

*Acts 1993, No. 126, § 1; Acts 1999, No. 868, § 1.*

**NECESSARY ACTION:** Circulate this Technical Advisory to all appropriate agency staff that handle personal lines surplus lines policies. Establish appropriate agency procedures to insure that all insurance companies sold by the agency are on the LDI “White List” which can be found on the IIABL website [www.iiabl.com](http://www.iiabl.com) front page “Quick Picks” or at the following LDI web link [http://www.lidi.la.gov/search\\_forms/white\\_list.cfm](http://www.lidi.la.gov/search_forms/white_list.cfm).