

SURPLUS LINES (E) TASK FORCE

Surplus Lines (C) Task Force Dec. 1, 2023, Minutes
Thomas Dawson Comment Letter (Attachment One)

Draft Pending Adoption

Draft: 12/11/23

Surplus Lines (C) Task Force
Orlando, Florida
December 1, 2023

The Surplus Lines (C) Task Force met in Orlando, FL, Dec. 1, 2023. The following Task Force members participated: James J. Donelon, Chair (LA); Larry D. Deiter, Vice Chair (SD); Lori K. Wing-Heier represented by Kayla Erickson (AK); Mark Fowler (AL); Ricardo Lara represented by Benjamin Chan (CA); Michael Conway represented by Rolf Kaumann (CO); Karima M. Woods represented by Laura Alexander (DC); Michael Yaworsky represented by Virginia Christy (FL); Doug Ommen represented by Mathew Cunningham (IA); Dean L. Cameron represented by Randy Pipal (ID); Dana Popish Severinghaus represented by Julie Rachford (IL); Vicki Schmidt represented by Julie Holmes (KS); Gary D. Anderson represented by Jim McCarty (MA); Kathleen A. Birrane represented by Erin Nickles (MD); Mike Causey represented by Angela Hatchell (NC); Scott Kipper (NV); Glen Mulready represented by Eli Snowbarger (OK); Michael Humphreys represented by Michael McKenney (PA); Michael Wise represented by Lauren Robertson (SC); Carter Lawrence represented by Trey Hancock (TN); Cassie Brown represented by Amy Garcia (TX); and Mike Kreidler represented by Jeff Baughman (WA).

1. Adopted its Summer National Meeting Minutes

Baughman made a motion, seconded by Kaumann, to adopt the Task Force's Aug. 13, 2023, minutes (*see NAIC Proceedings – Fall 2023, Surplus Lines (C) Task Force*). The motion passed unanimously.

2. Discussed Issues with the Current Service of Process Forms

Thomas Dawson (McDermott Will & Emery) submitted a comment letter (Attachment One) on an issue regarding the Uniform Certificate of Authority Application, Uniform Consent to Service of Process (Form 12), which is that a number of states require nonadmitted insurers to file. Dawson commented that the form was designed for admitted insurers and not for surplus lines insurers. Dawson indicated that a decision in *Mallory v. Norfolk Southern Railway Company* (No. 21-1168) concluded that parties to a suit are at home in the state that the commissioner or secretary of state was appointed as service of process, regardless of the cause of action. Dawson commented that the *Nonadmitted Insurance Model Act* (#870), Section 9 discusses service of process and suit on any cause of action arising from a policy regarding an insurer on the *NAIC Quarterly Listing of Alien Insurers*. Further, Dawson commented that the *Unauthorized Insurers Process Act* (#850) outlines the same limitations. Dawson commented that he is not advocating to amend Model #870 but to create a new service of process form that is specific to surplus lines insurers in order to improve uniformity across states. Dawson indicated that the overall goal would be to ensure the new form is consistent with Model #870 and Model #850. Sabrina Miesowitz (Lloyd's America) commented that there is a service of process form specific for certified and reciprocal reinsurers and that a solution could be to draft a similar form that references surplus lines insurers. Commissioner Donelon directed the formation of a drafting group to review the language within Model #870 and Model #850 and consider the development of a service of process form specifically for surplus lines insurers.

Having no further business, the Surplus Lines (C) Task Force adjourned.

SharePoint/NAIC Support Staff Hub/Member Meetings/C CMTE/SLTF/2023 Fall NM/SLTF Minutes Dec 1 2023.docx



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August 24, 2023

VIA EMAIL

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Re: Service of Process on Surplus Lines Insurers after *Mallory vs. Norfolk Southern Railway Co.*

Dear Andy,

Further to our brief conversation during the recent NAIC National Meeting on this subject I am writing on behalf of the International Underwriting Association of London (IUA) to provide you and colleagues with a brief note on the *Mallory* decision – a new “consent to jurisdiction” case (attached) , a comparison of the service of process provisions in NAIC Model #870 and #850 (attached for ease of reference), the standard UCAA Form 12 service of process appointment form (also attached for ease of reference) and a very brief note on what we are finding as we look at state versions of #850 and #870. In short, the UCAA Form 12 service of process appointment form that many states require to be filed before placing surplus lines insurers on local approved/eligible lists is inconsistent with Models #850 and #870. This inconsistency is a significant concern for the 30+ IUA members that appear on the Quarterly Listing.

While we understand that amending service of process provisions in state insurance codes to make them internally consistent with a single standard of applicability (to all suits against the surplus lines insurer? to suits “arising under” surplus lines policies? to suits “arising under” surplus lines policies AND brought by or on behalf of insureds or beneficiaries?) is beyond the scope, we propose the much more modest step of creating a new “UCAA Form 12 SL” that is tailored to and consistent with Section 9 of Model #870 and Section 2.A. of Model #850. Not every state that requires filing of state service of process appointment forms uses UCAA Form 12 but enough states do so to make it worthwhile we believe to create a new “UCAA Form 12 SL.”

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August 24, 2023
Page 2

The *Mallory* Decision

This past June a split Supreme Court decided that Norfolk Southern, having registered with the Pennsylvania Department of State and “consented” to be sued in Pennsylvania “on any cause of action” was bound by that decision, notwithstanding that Mr. Mallory’s suit essentially had nothing to do with Pennsylvania. Norfolk Southern was domiciled and headquartered in Virginia and the plaintiff was also a Virginia resident, injured by the railroad while working in Virginia and in Ohio. Previous extensive jurisdictional case law requiring “minimum contacts” with the forum state such that requiring a defendant to appear in a local court would be consistent with “fair play and substantial justice” ---and therefore with the Due Process Clause of the 14th Amendment--was distinguished by the *Mallory* Court.

Model #850 and Model #870

Model #850 --the Unauthorized Insurers Process Law---was adopted by most states (if not all states) beginning in the late 1940’s, after passage of the McCarran-Ferguson Act in 1945. In order to protect state residents, it authorizes, in Section 2.A., service of process “in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of a contract of insurance” on the chief regulatory official if an unauthorized insurer engages in “the business of insurance.” States reinforced their insurance codes after McCarran-Ferguson to demonstrate to Congress that they were in fact regulating the “business of insurance” in comprehensive fashion, not just regulating rates and forms used by admitted insurers. So, Unfair Trade Practices Laws, Unauthorized Insurers Process Laws (i.e. Model #850), etc. were developed and enacted around the country.

In Model #870, Section 9. (“Service of Process”) starts a little differently by addressing *suits brought by regulators or by the state*: “in any action, suit or proceeding in any court by the commissioner or by the state”. This appears to be a broad, general grant of authority with respect to actions by an “unauthorized person or a nonadmitted insurer” that constitute transacting insurance. If there are such actions the “unauthorized person or nonadmitted insurer” has appointed the chief insurance officer as agent for service of process “in any action, suit or proceeding in any court.” That is about as broad as it gets but it is understandable if viewed from the perspective of protecting or vindicating the rights of consumers. We have no quarrel with that language.

But there is additional language in Section 9 that is relevant to suits against nonadmitted surplus lines insurers by persons other than the commissioner:

“G. Notwithstanding conditions or stipulations in the policy or contract, a nonadmitted insurer may be sued upon any cause of action arising in this state, or relative to property, risks or exposures located or to be performed in this state, under any insurance contract made by it.”

UCAA Form 12

As you will see from the form itself, it is a broad service of process appointment, extending to “any notice, process or pleading as required by law as reflected on Exhibit A in any action or proceeding

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August 24, 2023
Page 3

against it in the State(s) so designated.” The language of Form 12 extends well beyond the scope of Section 9. G. in Model #870 Section and in Section 2. A. in Model #850.

We believe that UCAA Form 12 could be modified for surplus lines insurers with some simple edits so that it is consistent with both Model #870 and 850---as follows:

“any notice, process or pleading as required by law as reflected on Exhibit A in any action or proceeding against it in the State(s) so designated, instituted by or on behalf of an insured or beneficiary under any insurance contract made by it, relative to property, risks or exposures located or to be performed in this state.”

State Unauthorized Insurance Statutes

As these laws were enacted and particularly as states developed surplus lines laws, precursors of Model #870, integration with variants of Model #850 was uneven. Some explicitly provide that surplus lines insurance is not subject to the state’s version of the Unauthorized Insurers Process law. Other states included surplus lines-specific service of process provisions (as Model #870 does) but did not link or cross-reference with the Unauthorized Insurers Process Law statutes. Adding further complexity and confusion, states developed their own service of process appointment forms for surplus lines insurers. We believe that a new, surplus lines-specific “UCAA Form 12 SL” would be a small step in the direction of promoting consistency with respect to state service of process practices after *Mallory*.

Sincerely,



Thomas M. Dawson

TMD/st

Cc: Helen Dalziel - IUA

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