

HOUSE BILL NO. 1123

Introduced by

Industry, Business and Labor Committee

(At the request of the Insurance Commissioner)

1 A BILL for an Act to create and enact sections 26.1-44-01.1, 26.1-44-03.1, 26.1-44-06.1,
2 26.1-44-10, and 26.1-44-11 of the North Dakota Century Code, relating to surplus lines
3 insurance; and to amend and reenact sections 26.1-44-01, 26.1-44-02, 26.1-44-03, 26.1-44-04,
4 26.1-44-05, 26.1-44-06, and 26.1-44-08 of the North Dakota Century Code, relating to surplus
5 lines insurance.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1. AMENDMENT.** Section 26.1-44-01 of the North Dakota Century Code is
8 amended and reenacted as follows:

9 **26.1-44-01. Surplus lines insurance valid.**

10 Insurance contracts procured as surplus lines coverage from ~~unauthorized nonadmitted~~
11 insurers in accordance with this chapter are valid and enforceable as to all parties and must be
12 given recognition in all matters and respects to the same effect as like contracts issued by
13 ~~authorized admitted~~ insurers.

14 **SECTION 2.** Section 26.1-44-01.1 of the North Dakota Century Code is created and
15 enacted as follows:

16 **26.1-44-01.1. Definitions.**

- 17 1. "Admitted insurer" means an insurer licensed to engage in the business of insurance
18 in this state.
- 19 2. "Eligible surplus lines insurer" means a nonadmitted insurer with which a surplus lines
20 producer may place surplus lines insurance pursuant to section 26.1-44-03.
- 21 3. "Exempt commercial purchaser" means any person purchasing commercial insurance
22 that, at the time of placement, meets the following requirements:
- 23 a. The person employs or retains a qualified risk manager to negotiate insurance
24 coverage.

- 1 b. The person has paid aggregate nationwide commercial property and casualty
2 insurance premiums in excess of one hundred thousand dollars in the
3 immediately preceding twelve months.
- 4 c. (1) The person meets at least one of the following criteria:
- 5 (a) The person possesses a net worth in excess of twenty million dollars,
6 as such amount is adjusted pursuant to paragraph 2.
- 7 (b) The person generates annual revenues in excess of fifty million
8 dollars, as such amount is adjusted pursuant to paragraph 2.
- 9 (c) The person employs more than five hundred full-time or full-time
10 equivalent employees per individual insured or is a member of an
11 affiliated group employing more than one thousand employees in the
12 aggregate.
- 13 (d) The person is a not-for-profit organization or public entity generating
14 annual budgeted expenditures of at least thirty million dollars, as such
15 amount is adjusted pursuant to paragraph 2.
- 16 (e) The person is a municipality with a population in excess of fifty
17 thousand persons.
- 18 (2) Each fifth January first occurring after July 21, 2010, and ongoing thereafter,
19 the amounts in subparagraphs a, b, and d of paragraph 1 will be adjusted to
20 reflect the percentage change for such five-year period in the consumer
21 price index for all urban consumers published by the bureau of labor
22 statistics of the department of labor.
- 23 4. "Home state".
- 24 a. Except as provided in subdivision b, "home state" means, with respect to an
25 insured:
- 26 (1) The state in which an insured maintains its principal place of business or, in
27 the case of an individual, the individual's principal residence; or
- 28 (2) If one hundred percent of the insured risk is located out of the state referred
29 to in paragraph 1, the state to which the greatest percentage of the
30 insured's taxable premium for that insurance contract is allocated.

- 1 b. If more than one insured from an affiliated group are named insureds on a single
2 nonadmitted insurance contract, the term "home state" means the home state, as
3 determined pursuant to subdivision a, of the member of the affiliated group that
4 has the largest percentage of premium attributed to it under such insurance
5 contract.
- 6 5. "Independently procured insurance" means insurance procured directly by an insured
7 from a nonadmitted insurer.
- 8 6. "Kind of insurance" means one of the types of insurance required to be reported in the
9 annual statement which must be filed with the commissioner by admitted insurers.
- 10 7. "Nonadmitted insurance" means any property and casualty insurance permitted to be
11 placed directly or through a surplus lines producer with a nonadmitted insurer eligible
12 to accept such insurance pursuant to section 26.1-44-03.
- 13 8. "Nonadmitted insurer" means an insurer not licensed to engage in the business of
14 insurance in this state but does not include a risk retention group as defined in
15 paragraph 4 of subdivision a of section 2 of the Liability Risk Retention Act of 1986
16 [15 U.S.C. 3901(a)(4)].
- 17 9. "Reciprocal state" means a state that has:
- 18 a. Entered into a nonadmitted insurance compact; or
- 19 b. Otherwise adopted the allocation schedule and reporting forms prescribed by a
20 multistate agreement for nonadmitted insurance.
- 21 10. "Surplus lines insurance" means any property and casualty insurance in this state on
22 properties, risks, or exposures, located or to be performed in this state, permitted to be
23 placed through a surplus lines producer with a nonadmitted insurer eligible to accept
24 such insurance pursuant to section 26.1-44-03.
- 25 11. "Surplus lines producer" means a person licensed under chapter 26.1-26 to place
26 insurance on properties, risks, or exposures located or to be performed in this state
27 with nonadmitted insurers eligible to accept such insurance pursuant to section
28 26.1-44-03.
- 29 12. "Type of insurance" means coverage afforded under the particular policy that is being
30 placed.

1 **SECTION 3. AMENDMENT.** Section 26.1-44-02 of the North Dakota Century Code is
2 amended and reenacted as follows:

3 **26.1-44-02. Affidavit as prerequisite of insurance – Contents**Duty to file evidence of
4 insurance and affidavits.

5 AEach surplus lines insurance producer licensed under chapter 26.1-26, within sixty days
6 after the placing of any surplus lines insurance where the insured's home state is this state,
7 shall in every case execute and file with a written report regarding the insurance which must be
8 kept confidential by the commissioner within sixty days of the effective date of any surplus lines
9 insurance policy, indemnity contract, or surety bond an affidavit in acceptable form that after a
10 diligent search, an inability exists to procure the insurance, indemnity contract, or surety bond
11 desired from an insurer authorized to do business in this state. There is a presumption that such
12 inability exists and that a diligent search has been made if the insurance, indemnity contract, or
13 surety bond provides coverage listed by the commissioner as an approved surplus lines
14 coverage. If the commissioner concurs in the allegation in the affidavit, the commissioner may
15 authorize the procuring of the insurance, indemnity contract, or bond from an insurer not
16 authorized to do business in this state. The report must include:

- 17 1. The name and address of the insured;
- 18 2. The identity of the insurer or insurers;
- 19 3. A description of the subject and location of the risk;
- 20 4. The amount of premium charged for the insurance;
- 21 5. A tax allocation spreadsheet detailing the portion of premium attributable to properties,
22 risks, or exposures located in each state;
- 23 6. Any other pertinent information as the commissioner may reasonably require; and
- 24 7. An affidavit on a form prescribed by the commissioner as to the diligent efforts to place
25 the coverage with admitted insurers and the results of that effort. The affidavit must be
26 open to public inspection. The affidavit must affirm that the insured was expressly
27 advised in writing prior to placement of the insurance that:
 - 28 a. The surplus lines insurer with whom the insurance was to be placed is not
29 licensed in this state and is not subject to the state's supervision; and
 - 30 b. In the event of the insolvency of the surplus lines insurer, losses will not be paid
31 by the state insurance guaranty fund.

1 A surplus lines producer seeking to place nonadmitted insurance for an exempt commercial
2 purchaser is not required to make a due diligence search if the surplus lines producer has
3 disclosed to the exempt commercial purchaser that such insurance may or may not be available
4 from the admitted market that may provide greater protection with more regulatory oversight
5 and the exempt commercial purchaser has subsequently requested in writing the surplus lines
6 producer to procure or place such insurance from a nonadmitted insurer.

7 **SECTION 4. AMENDMENT.** Section 26.1-44-03 of the North Dakota Century Code is
8 amended and reenacted as follows:

9 **26.1-44-03. Surplus lines in solvent insurers insurance.**

10 ~~A surplus lines insurance producer may not knowingly place surplus lines insurance with an~~
11 ~~insurer that is financially unsound. The surplus lines insurance producer shall ascertain the~~
12 ~~financial condition of the unauthorized insurer before placing insurance with the insurer. The~~
13 ~~surplus lines insurance producer may not so insure with:~~

- 14 1. ~~Any insurer having less than five hundred thousand dollars of capital and five hundred~~
15 ~~thousand dollars in surplus, if a stock company, and five hundred thousand dollars in~~
16 ~~surplus, if a mutual company.~~
- 17 2. ~~Any alien insurer that has not established an effective trust fund of at least one million~~
18 ~~dollars within the United States administered by a recognized financial institution and~~
19 ~~held for the benefit of all its policyholders in the United States or policyholders and~~
20 ~~creditors in the United States. The placement of nonadmitted insurance is subject to~~
21 this section only if the insured's home state is this state. Surplus lines insurance may
22 be placed by a surplus lines producer if:
- 23 1. Each insurer is an eligible surplus lines insurer;
- 24 2. Each insurer is authorized to write the kind of insurance in its domiciliary jurisdiction;
- 25 3. The full amount or type of insurance cannot be obtained from insurers who are
26 admitted to do business in this state. The full amount or type of insurance may be
27 procured from eligible surplus lines insurers provided that a diligent search is made
28 among the insurers who are admitted to transact and are actually writing the particular
29 type of insurance in this state if any are writing it;
- 30 4. At the time of placement the surplus lines producer has determined that the
31 nonadmitted insurer:

- 1 a. Has established satisfactory evidence of good repute and financial integrity and
2 has capital and surplus or its equivalent under the laws of its domiciliary
3 jurisdiction which equals the greater of:
- 4 (1) (a) The minimum capital and surplus requirements under the law of this
5 state; or
6 (b) Fifteen million dollars.
- 7 (2) The requirements of paragraph 1 may be satisfied by an insurer possessing
8 less than the minimum capital and surplus upon an affirmative finding of
9 acceptability by the commissioner. The finding must be based upon such
10 factors as quality of management, capital and surplus of any parent
11 company, company underwriting profit and investment income trends,
12 market availability, and company record and reputation within the industry.
13 The commissioner may not make an affirmative finding of acceptability
14 when the nonadmitted insurer's capital and surplus is less than four million
15 five hundred thousand dollars; or
- 16 b. For an insurer not domiciled in the United States or its territories, the insurer is
17 listed on the quarterly listing of alien insurers maintained by the national
18 association of insurance commissioners international insurers department; and
- 19 5. All other requirements of this chapter are met.

20 **SECTION 5.** Section 26.1-44-03.1 of the North Dakota Century Code is created and
21 enacted as follows:

22 **26.1-44-03.1. Surplus lines tax.**

- 23 1. In addition to the full amount of gross premiums charged by the insurer for the
24 insurance, every surplus lines producer shall collect and pay to the commissioner a
25 sum equal to one and three-fourths percent of the gross premiums charged,
26 assessments, membership fees, subscriber fees, policy fees, and service fees, less
27 any return premiums, for surplus lines insurance provided by the surplus lines
28 producer. Where the insurance covers properties, risks, or exposures located or to be
29 performed both in and out of this state, the sum payable must be computed based on:
- 30 a. An amount equal to one and three-fourths percent on that portion of the gross
31 premiums allocated to this state plus;

- 1 b. An amount equal to the portion of the premiums allocated to other states or
2 territories on the basis of the tax rates and fees applicable to other properties,
3 risks, or exposures located or to be performed outside of this state less:
- 4 c. The amount of gross premiums allocated to this state and returned to the
5 insured.
- 6 2. The tax on any portion of the premium unearned at termination of insurance having
7 been credited by the state to the surplus lines producer must be returned to the
8 policyholder directly by the surplus lines producer. The surplus lines producer is
9 prohibited from rebating, for any reason, any part of the tax.
- 10 3. The commissioner may participate in a multistate compact or reciprocal agreement
11 with other states for the purpose of collecting, allocating, and disbursing to reciprocal
12 states any funds collected pursuant to subdivision b of subsection 1 applicable to other
13 properties, risks, or exposures located or to be performed outside of this state. To the
14 extent that other states where portions of the properties, risks, or exposures reside
15 have failed to enter into a compact or reciprocal allocation procedure with this state,
16 the net premium tax collected must be retained by this state.
- 17 4. At the time of filing the verified report as set forth in section 26.1-44-06.1, each surplus
18 lines producer shall pay the premium tax due for the policies written during the period
19 covered by the report.
- 20 5. If a surplus lines policy procured through a surplus lines producer covers properties,
21 risks, or exposures only partially located or to be performed in this state, the tax due
22 must be computed on the portions of the premiums which are attributable to the
23 properties, risks, or exposures located or to be performed in this state. In determining
24 the amount of premiums taxable in this state, all premiums written, procured, or
25 received in this state must be considered written on properties, risks, or exposures
26 located or to be performed in this state, except premiums which are properly allocated
27 or apportioned and reported as taxable premiums of a reciprocal state.

28 **SECTION 6. AMENDMENT.** Section 26.1-44-04 of the North Dakota Century Code is
29 amended and reenacted as follows:

1 **26.1-44-04. Service of process.**

2 Any insurer desiring to transact any business under this chapter, by any surplus lines
3 insurance producer in this state, shall appoint in writing the commissioner as its true and lawful
4 attorney, upon whom legal process in any action or proceeding against it must be served, and in
5 the writing, shall agree that any legal process against it, which is served upon the attorney, is of
6 the same legal force and validity as if served upon the insurer, and that the authority continues
7 in force so long as any liability remains outstanding in this state. Copies of the appointment
8 certified by the commissioner are sufficient evidence thereof and must be admitted in evidence
9 with the same force and effect as the original. Legal process may not be served upon the
10 insurer except as provided by this section. In any suit on a policy on behalf of the owner or
11 holder of the policy, the service of process must be made as provided by this section, but the
12 action must be prosecuted in the county of the policyholder's residence.

13 **SECTION 7. AMENDMENT.** Section 26.1-44-05 of the North Dakota Century Code is
14 amended and reenacted as follows:

15 **26.1-44-05. Endorsement of policyConsumer notice.**

16 ~~Every policy issued under this chapter must be endorsed "THIS POLICY IS ISSUED~~
17 ~~PURSUANT TO THE NORTH DAKOTA SURPLUS LINES INSURANCE STATUTE UNDER~~
18 ~~THE SURPLUS LINES PRODUCER'S LICENSE OF _____. THE INSURER IS A QUALIFIED~~
19 ~~SURPLUS LINES INSURER, BUT IS NOT OTHERWISE LICENSED BY THE STATE OF~~
20 ~~NORTH DAKOTA AND DOES NOT PARTICIPATE IN THE NORTH DAKOTA INSURANCE~~
21 ~~GUARANTY ASSOCIATION."~~ The surplus lines insurance producer shall properly complete the
22 endorsement by typing or printing the producer's full name in the space provided and shall sign
23 and date the endorsement. The surplus lines producer shall give the following consumer notice
24 to every person applying for insurance with a nonadmitted insurer. The notice must be printed in
25 sixteen-point type on a separate document affixed to the application. The applicant shall sign
26 and date a copy of the notice to acknowledge receiving it. The surplus lines producer shall
27 maintain the signed notice in its file for a period of five years from expiration of the policy. The
28 surplus lines producer shall tender a copy of the signed notice to the insured at the time of
29 delivery of each policy the producer transacts with a nonadmitted insurer. The copy must be a
30 separate document affixed to the policy.

1 "Notice: 1. An insurer that is not licensed in this state is issuing the insurance policy that you
2 have applied to purchase. These companies are called "nonadmitted" or "surplus lines"
3 insurers. 2. The insurer is not subject to the financial solvency regulation and enforcement that
4 applies to licensed insurers in this state. 3. These insurers generally do not participate in
5 insurance guaranty funds created by state law. These guaranty funds will not pay your claims or
6 protect your assets if the insurer becomes insolvent and is unable to make payments as
7 promised. 4. Some states maintain lists of approved or eligible surplus lines insurers and
8 surplus lines producers may use only insurers on the lists. Some states issue orders that
9 particular surplus lines insurers cannot be used. 5. For additional information about the above
10 matters and about the insurer, you should ask questions of your insurance producer or surplus
11 lines producer. You may also contact your insurance department consumer help line."

12 **SECTION 8. AMENDMENT.** Section 26.1-44-06 of the North Dakota Century Code is
13 amended and reenacted as follows:

14 **26.1-44-06. Record of business -- Filing of statement -- Content**
15 **Records of surplus**
16 **lines producer.**

17 ~~Every~~Each surplus lines insurance producer shall keep a separate account of the business
18 under the producer's license and on or before the first day of April in each year shall file with the
19 commissioner a statement for the twelve months preceding, ~~giving the name of the insured to~~
20 ~~whom a policy or indemnity contract granting unauthorized insurance has been issued, the~~
21 ~~name and home office of each insurer issuing the policy or contract, the amount of the~~
22 ~~insurance, the rates charged, the gross premiums charged, the date and term of the policy, and~~
23 ~~the amount of premium returned on each policy canceled or not taken, with such information~~
24 ~~and upon such form as required by the commissioner, and pay the commissioner an amount~~
25 ~~equal to the taxes imposed by law on the premiums of authorized insurance companies. If a~~
26 ~~surplus lines policy covers risks or exposures only partially in this state, the tax so payable must~~
27 ~~be computed upon the portion of the premium which is properly allocable to the risks or~~
28 ~~exposures located in this state.~~ in this state a full and true record of each surplus lines insurance
29 contract placed by or through the producer, including a copy of the policy, certificate, cover note,
30 or other evidence of insurance showing each of the following applicable items:

- 30 1. Amount of the insurance, risks, and perils insured;
- 31 2. Brief description of the property insured and its location;

- 1 3. Gross premium charged;
 - 2 4. Any return premium paid;
 - 3 5. Rate of premium charged upon the several items of property;
 - 4 6. Effective date and terms of the contract;
 - 5 7. Name and address of the insured;
 - 6 8. Name and address of the insurer;
 - 7 9. Amount of tax and other sums to be collected from the insured;
 - 8 10. Allocation of taxes by state;
 - 9 11. Identity of the producer of record;
 - 10 12. Any confirming correspondence from the insurer or its representative; and
 - 11 13. The application.
- 12 The surplus lines producer shall keep open the record of each contract at all reasonable times
13 to examination by the commissioner without notice for a period not less than five years following
14 termination of the contract. In lieu of maintaining offices in this state, each nonresident surplus
15 lines producer shall make available to the commissioner any and all records that the
16 commissioner deems necessary for examination.

17 **SECTION 9.** Section 26.1-44-06.1 of the North Dakota Century Code is created and
18 enacted as follows:

19 **26.1-44-06.1. Reports - Summary of exported business.**

20 On or before April first of each year, each surplus lines producer shall file with the
21 commissioner on forms prescribed by the commissioner a verified report of all surplus lines
22 insurance transacted during the preceding calendar year, including:

- 23 1. Aggregate gross premiums written;
- 24 2. Aggregate return premiums;
- 25 3. Amount of aggregate tax remitted to this state; and
- 26 4. Amount of aggregate tax due or remitted to each other state for which an allocation is
27 made pursuant to section 26.1-44-03.1.

28 A verified report is not required to be filed when a surplus lines producer has transacted no
29 surplus lines insurance during the preceding calendar year.

30 **SECTION 10. AMENDMENT.** Section 26.1-44-08 of the North Dakota Century Code is
31 amended and reenacted as follows:

1 **26.1-44-08. Civil penalty for failure to file statement and pay tax - Action for recovery -**
2 **Revocation of license - Conditions prerequisite to reissuance - Hearing procedure and**
3 **judicial review.**

4 Every such surplus lines insurance producer who fails or refuses to make and file the
5 ~~annual statement~~verified report required by section 26.1-44-06.1, and to pay the taxes required
6 to be paid prior to the first day of May after such tax is due, is liable for a fine of twenty-five
7 dollars for each day of ~~delinquencedelinquency~~. The tax and fine may be recovered in an action
8 to be instituted by the commissioner in the name of the state, the attorney general representing
9 the commissioner, in any court of competent jurisdiction, and the fine, when so collected, must
10 be paid to the state treasurer and placed to the credit of the general fund. The commissioner, if
11 satisfied that the delay in filing the ~~annual statement~~verified report and the payment of the tax
12 was excusable, may waive all or any part of the fine. The commissioner may revoke or suspend
13 the surplus lines insurance producer's license ~~of the producer~~ if any surplus lines insurance-
14 producer fails to make and file the ~~annual statement~~verified report and pay the taxes, or refuses
15 to allow the commissioner to inspect and examine the producer's records of the business
16 transacted by the producer pursuant to this chapter, or fails to keep the records in the manner
17 required by the commissioner, or falsifies the affidavit referred to in section 26.1-44-02.

18 If the license of a surplus lines insurance producer is revoked, whether by the action of the
19 commissioner or by judicial proceedings, another license may not be issued to that surplus lines
20 insurance producer until two years have elapsed from the effective date of the revocation, nor
21 until all taxes and fines are paid, nor until the commissioner is satisfied that full compliance with
22 this chapter will be had.

23 **SECTION 11.** Section 26.1-44-10 of the North Dakota Century Code is created and enacted
24 as follows:

25 **26.1-44-10. Independently procured insurance - Duty to report and pay tax.**

26 In accordance with subsection 9 of section 26.1-02-05, each insured in this state who
27 independently procures or continues or renews insurance with a nonadmitted insurer on
28 properties, risks, or exposures located or to be performed in whole or in part in this state, other
29 than insurance procured through a surplus lines producer, is subject to the same requirements
30 under this chapter as apply to a surplus lines producer.

1 **SECTION 12.** Section 26.1-44-11 of the North Dakota Century Code is created and enacted
2 as follows:

3 **26.1-44-11. Interstate insurance regulatory cooperation.**

4 To carry out the purposes of the Nonadmitted and Reinsurance Reform Act of 2010
5 [Pub. L. 111-203; 124 Stat. 1589; 15 U.S.C. 8201 et seq.], the commissioner may participate in
6 a nonadmitted insurance multistate agreement or compact for the purposes of collecting,
7 allocating, and disbursing premium taxes attributable to the placement of nonadmitted
8 insurance, providing for uniform methods of allocation and reporting among nonadmitted
9 insurance risk classifications, sharing information among states relating to nonadmitted
10 insurance premium taxes, and providing for the determination of recommended uniform
11 eligibility standards for nonadmitted insurers.