



WHAT'S IN A NAME?

What's in a name? That which we call a broker by any other name would smell as sweet. Or would it? William Shakespeare probably never considered the difference between an insurance agent and a broker, but it would be prudent for New York-licensed excess line producers to do otherwise.

At their core, insurance agents and brokers serve different masters; an agent represents the insurer, while a broker represents the insured. It is a basic and critical difference. There are important implications that flow from this fundamental contrast as discussed below.

Throughout the country, E&S producers are typically classified as **brokers** and this is certainly the case in New York. Some states, including Florida, Texas, Indiana, Wisconsin and Tennessee use the term "surplus lines **agent**." This no doubt causes some confusion and obscures the differences between terms, and it is important to understand how different states may view using the incorrect designation. Moreover, the terms "agent," "general agent," and "managing general agent" are used generically in our marketplace, though some regulators bristle at this description when employed to describe E&S brokers. In the case of New York, **it can get an excess line broker fined.**

broker
managing general agent
general agent
surplus lines broker
agent

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New York Insurance Law §2101(c) defines an insurance broker as:

any person, firm, ... who ... aids ... in soliciting, negotiating or selling, any insurance ..., **on behalf of an insured ...**

New York Insurance Law §2117(e) specifically states:

This section shall not ... **permit any unauthorized insurer to do any insurance business by its agent acting within this state; but licensed insurance brokers acting pursuant to subsections (b) and (c) hereof may issue to their clients, the insureds, confirmation of insurance so lawfully placed.**

Therefore, while New York law provides for brokers to place excess line business, it specifically prohibits agents from doing the same. [OGC Opinion No. 07-09-26](#) makes this prohibition crystal clear:

An agent licensed in New York may operate only on behalf of an insurer that appointed the agent, and may not operate on behalf of an insurer unauthorized to do business in New York. See O.G.C. Opinion No. 99-38 (April 26, 1999).

Not only may an agent not directly place excess line coverage, but an agent may not even procure excess line insurance through a licensed excess line broker. Only a licensed insurance broker may serve as the retail producer that places excess line coverage through an excess line wholesale broker. Insurance agents have no role in excess line placements.

[Insurance Law Section 2118\(f\)](#) permits excess line brokers to exercise binding authorities delegated by excess line insurers provided the agreements are in writing, signed by both parties, contain provisions required by statute, and are filed by the broker with ELANY. Although these certainly sound like the duties of an agent, the DFS objects to defining the excess line broker as an agent of the company in these binding authority agreements and interprets this authority as facilitating the transaction of excess line business, but not changing the legal duty of loyalty an excess line broker owes to an insured. These agreements should not authorize more than one insurer or brokerage entity, and the term “agent” should not be used to describe an excess line broker.

If an excess line broker makes a placement with an excess line insurer with whom it does not have binding authority, it can deliver a binder issued by the insurer or another party which has legal binding authority, but cannot create one itself. Otherwise, a broker has no right or apparent authority to bind an insurer to any contract. In recognition of this, New York law permits excess line brokers to issue a Confirmation of Placement. Its content is almost the same as a binder and confirms what the carrier has told the broker, but it does not purport to establish that the broker is acting on the carrier’s behalf.

When the DFS examines ELANY’s records, it looks for binders issued by excess line brokers that have not filed binding authorities. In such cases, the DFS takes the position that those binders indicate the broker was illegally acting as an agent for an unauthorized insurer in New York.



In California, the laws are even more restrictive. New York law permits an excess line insurer to share office space in the state with an affiliated licensed insurer, and to issue excess line policies and binders from that office. New York also permits binding authority as discussed above. California does not even permit surplus lines risks to be bound within the state by insurers or producers. One of the largest fines involving surplus lines in California history was based in part upon a finding that a producer acted as a managing general agent for an E&S insurer.

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The message is clear. In New York, excess line brokers cannot be agents and calling oneself an agent, general agent or managing general agent is a problem. Binding authority does not change this fact. Instead, a binding authority agreement can be called just that, and an excess line broker can call itself producer, program administrator, program manager, or even a managing general underwriter.

Excess line producers are licensed insurance brokers, not agents, and so to all excess line producers, we offer an important piece of advice—to thine own self be true.

