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2012 ELANY ANNUAL MEMBERS' MEETING CELEBRATED INDUSTRY LEGENDS

—Dick Bouhan, David Isenberg, Lee Orabona, and Kurt Bingeman

While 2011 may have been a transformative year for the excess line industry, the ELANY Annual Members' Meeting, held on May 14, 2012, was a more traditional festival of fun and fellowship as four giants of the industry received their just due from admiring colleagues.

About 80 attendees at a Battery Park restaurant celebrated close to two centuries of excess line experience with legends Dick Bouhan, David Isenberg, Lee Orabona and Kurt Bingeman.

ELANY Board Chairman, TJ Derella, kicked off the tributes with accolades for David Isenberg, who recently retired as president of the D.C. White Agency, by saluting his nearly 40 years with the firm and 49 years of wedded bliss.

"He is a pro's pro and as grizzled a veteran as you are going to get in this business, who can manually rate a commercial auto policy in the blink of an eye out of the ISO manual," Derella said.

Industry legend, Lee Orabona, currently heads the Long Island office of MarketScout Wholesale. But this was by no means his first gig in the industry he loves. Steve Gandley scanned the list of now defunct companies that Orabona has served and noted that "Lee has closed more companies than Mitt Romney."

Lee's passion extends beyond the excess line industry that he has served with distinction for nearly four decades. "Lee is passionate about golf, for instance," he said. "He stinks at it, but at least he is passionate. When he talks about the excess line industry, he becomes almost orgasmic," Gandley said. "His enthusiasm is his calling card."

Honoree Bouhan became the honorer for Kurt Bingeman, President of Buffalo based Russell Bond & Co. Inc., saluting him for

his pioneering role in making the National Association of Professional Surplus Lines Offices (NAPSLO) a respected national spokesman for the interests of the excess line industry as one of its first presidents.

"When he was president, I don't think there was an insurance association meeting that he did not attend," Bouhan said. He also said that Bingeman's cool demeanor was invaluable in ELANY's formative years when New York State Insurance Department officials were less than enthusiastic about its coming into being. "If body language (of Department officials) could kill, many of us would not be here today," Bouhan said. "But Kurt could stare them down like the best of them."

Bingeman's true passion was educating a new generation of excess line professionals, even if it meant one day that they would become his sharpest competitors. "But that would not have bothered Kurt at all. In fact, he would have loved it," Bouhan said.

And finally, ELANY Executive Director, Dan Maher, led the tribute to Bouhan, who in his 30 years at NAPSLO, took a fledgling organization with no national legitimacy and a sketchy reputation at the state level and turned it into a powerful and effective lobbying force "all with a fabulous smile and a great sense of humor."

Maher also noted that Bouhan was at the forefront of both the great technological changes that have transformed the industry along with the legislative and regulatory reforms that culminated in the 2010 passage of the Nonadmitted Reinsurance Reform Act.

Left to Right: Dave Isenberg and TJ Derella; Steve Gandley and Lee Orabona; Kurt Bingeman and Dick Bouhan; Dan Maher with Dick Bouhan



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MARK ARAGONA

D&O INSURANCE PIONEER

Mark Aragona may not have been present at the creation of the directors and officers (D&O) insurance market, but he takes pride that he walked and worked among the pioneers in the field.

What with WorldCom, Enron and Bear Stearns as emblems of corporate malfeasance run amok in this century, there are very few, if any, of the Fortune 1000 companies today that do not carry D&O coverage.

This was not always so back in the “Mad Men” era when some corporate executives took more chances, not only with their constant smoking and three martini lunches but with the fact that angry shareholders might take their wrath out on directors and officers when profits and share pricing did not head in the right direction.

Aragona began his career in 1959 as an underwriter trainee for the Zurich Corporation but stayed only a couple of years when he found that insurance brokering was his thing.

In 1967, he joined the excess line wholesaler, Stewart Smith, where he stayed more than two decades honing his expertise in the D&O field along with umbrella liability insurance and other coverages.

“When we started out we were not quite as successful in the market as we would have liked to have been,” Aragona said.

He could recall getting a quote from one of his carriers that was passed on to the retail broker and finally to the potential insured four or five times with no sale.

“And then, all of a sudden, they were interested in it and they started to buy it,” he said. “It was a small market but soon other carriers started to write it.”

At that time, the excess line market, specifically Lloyds, wrote most of the coverage. Soon AIG got into the act along with Chubb subsidiary, Pacific Indemnity, and other admitted companies.

Lloyds started the coverage back in the 1930s, when according to author-attorney David Gische, corporations were not permitted to indemnify their directors and officers. “However, directors and officers did not perceive a great risk and the insurance did not sell well. Well into the 1960s, the D&O market was negligible,” he wrote.

In the next two decades, corporations began seeing benefits to corporate indemnification and prompted state legislatures to enact laws permitting it. “Then during the 1960s changes in the interpretation of securities laws created the realistic possibility that directors and

officers themselves, and not only corporations, could face significant liability,” Gische wrote.

Aragona said that at first, insurance buyers thought they might have been above the need for such coverage. At the time, only about 20 percent of companies sought that kind of protection.

“Human nature being what it is, they took pride in their company, and they did not know the exposure. They would say we do not do things like this,” he said.

“But hindsight is always 20–20,” Aragona said, and soon companies found out that in good times, shareholders will overlook a lot; but when things go bad, “that is when they start to look at their insurance policies.”

Then came the Penn Central Railroad bankruptcy in 1970 that would come to symbolize corporate malfeasance in the Vietnam Era to what Enron and WorldCom epitomized in the post September 11th time period.

Penn Central Railroad controlled about 35% of the rail traffic in the country, and its default on \$87 million of its short term loans created shock waves throughout the financial community.

“And so with all these articles in the Wall Street Journal and all the big companies that had taken such a hit on what they thought was good paper, all of a sudden more and more companies started seeing the value of this kind of coverage,” Aragona said.

Decades before Goldman Sachs gained notoriety for purportedly gaming the mortgage debt crisis for its benefit and allegedly to the detriment of its clients, the brokerage came under fire for a similar activity in the Penn Central debacle, allegedly selling short term notes at 100 cents on the dollar when it was apparent that the end for Penn Central was near.

Proceeds from the D&O insurance claims settlement were among the factors that helped stave off collapse more than 40 years ago and helped prove the value of such coverage to the business community in decades to come.

Author and Goldman Sachs expert, William Cohan, said the firm at the time faced an almost existential threat when it was discovered that it continued to market the paper to some of the biggest companies in the country at 100 cents on the dollar, even though at the time it was aware of the perilous financial straits Penn Central was in.

“Incredibly, Goldman thought it could win the lawsuits and allowed them to go to trial, where much of the firm’s dirty laundry was aired,” Cohan wrote. “In the end, it lost the suit brought by the three companies and paid the plaintiffs 100 cents on the dollar, plus interest.”



Mark Aragona

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More importantly, Cohan said the firm's partners were petrified that with more than \$80 million in potential claims against it and only \$50 million in partners' capital, continued lawsuits could put Goldman out of business, taking everything the partners had earned over the years with it.

"In the end, the firm squeaked through the crisis, thanks to a combination of good luck and an assortment of insurance payments and settlements," Cohan wrote. "It also held on to the Penn Central commercial paper it took back from its clients through the company's bankruptcy until it regained its value."

THE NONADMITTED AND REINSURANCE REFORM ACT

Implementation issues and concerns

Excess line industry stakeholders held out great hope two years ago when the Nonadmitted and Reinsurance Reform Act (NRRRA) was signed into law but have since learned that implementation issues have proved more complicated than previously envisioned.

However, ELANY officials have been hard at work with regulators and others to help insure the post NRRRA world lives up to the aspirations of those who helped craft the legislation over the past decade.

The NRRRA prohibits states from setting up their own surplus lines insurer eligibility requirements. Nevertheless, this has led to some controversy as to what is and what is not preempted.

Last year, the New York State Department of Financial Services (DFS) amended Regulation 41 to reiterate that brokers still have the duty to obtain certain documentation from excess line insurers to meet the "due care" standard when choosing a carrier. The Regulation expressly restated that the obligation is met if the insurer files the documentation with ELANY.

"Unfortunately, some carriers believe that the NRRRA pre-empts such requirements, but we must respectfully disagree," said ELANY Executive Director Dan Maher.

"Regulation 41 continues to be the final word with regard to the brokers' due care duty until it is overturned by a court of competent jurisdiction or the regulation is amended," Maher said.

"Brokers are now between a rock and a hard place in that the supposed new paradigm said to come into being in the post NRRRA era is not reflected in New York insurance regulations, and they are concerned about where their responsibilities lie," Maher said.

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Although the admitted market today dominates, Aragona said that the excess line market still writes about 25% of the D&O coverage, focusing on companies that for any number of reasons the admitted market is reluctant to write.

Aragona served on the Board of ELANY in the 1990's and knows the value the organization holds in smoothing the sometimes difficult relationship between the regulators and the regulated.

"Dan (Maher) and everyone there has done a great job in keeping us all informed with what is going on with the both the regulators and the legislators in Albany and other state capitals," Aragona said.

On the national level, Dick Bouhan, past Executive Director and current consultant for the National Association of Professional Surplus Lines Offices (NAPSLO), said about two thirds of the state have such lists carriers must register on before brokers can purchase their coverage.

"For the rest of the states, it is up to the responsibility of the brokers to see if the carrier is eligible," he said.

Maher said additional duties and legal exposures now exist for any broker that makes a placement with an insurer that has failed to provide ELANY the proper documentation.

"If brokers want to obtain coverage from a non-listed carrier, they should contact ELANY to verify the carrier is indeed eligible but for whatever reason has yet to file the proper documentation," Maher said.

David Kodama, Senior Director for the Property Casualty Insurers Association of America (PCI), said that New York is among the 46 states that have amended their insurance and tax laws to comply with the NRRRA.

"Like other states, the New York State Department of Financial Services and ELANY must review these insurer requirements to determine what changes may be necessary to comply with Section 524 of the NRRRA," Kodama said.

Maher confirmed that discussions are ongoing between the DFS and ELANY on how best Regulation 41 can be amended to reflect the realities of the post NRRRA world.

Part of the discussions include how to beef up the National Association of Insurance Commissioners (NAIC) oversight that places alien insurance carriers on the International Insurance Department (IID) list. The NRRRA

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states that placement on the IID list permits excess line brokers in any state to obtain coverage from that listed carrier.

Maier and other insurance officials have expressed concern that the NAIC currently lacks adequate resources to analyze financial data from alien companies to fully vet the insurers.

"The New York and California Departments play prominent roles in the supervision of the IID list," Maier said.

While the NRRRA prohibits state specific financial eligibility standards, it does not impact state laws that prohibit, for instance, unauthorized insurers from soliciting, negotiating and advertising to the general public.

DOMESTIC EXCESS LINE INSURER LEGISLATION (S.6808/A.9783)

Insurers may soon be allowed to set up New York domestic excess lines subsidiaries able to write business on New York home stated risks, according to the terms of legislation currently making its way in Albany.

ELANY Executive Director, Dan Maier, said the legislation (S.6808/A.9783), if enacted, would help to create jobs by facilitating New York carriers to expand their operations.

"The legislation is intended to attract new business to the state with the concomitant economic benefits and avoid the loss of business to other states, if such legislation is enacted," he said.

Historically, an insurance group would have to establish two separate excess line insurance companies. One would operate in the 49 other states but could not write excess line insurance in its state of incorporation where it is licensed. This required a second excess line insurer to be incorporated in a different state so it could underwrite excess line insurance in the domiciliary state of the originally created excess line insurer.

Moreover, a carrier that underwrites an excess line multi-state risk under the excess line laws of the insured's home state and has exposures in

In a letter to Robert Easton, Executive Deputy Superintendent for DFS, Maier stated that any effort to bolster IID criteria should deal with "issues such as advertising and solicitation prohibitions or premium payment to the broker constituting payment to the insurer and should to the extent possible be made uniform throughout the states."

"These concerns could possibly be addressed in a global amendment to the IID Plan," Maier added.

Ultimately, Regulation 41 needs further revision in the aftermath of the myriad issues arising from NRRRA implementation. "If New York cannot prohibit excess line placement with IID listed insurers and cannot mandate the filing of eligibility documents, the current language of Regulation 41 holds excess line licensees to standards they are powerless to meet."

other states, where the carrier is licensed, faces the possibility that a court, where the insurer is licensed, will not apply the excess line law but might apply the law relating to a licensed insurer.

Since 1998 when Illinois first enacted such legislation, five additional states – Arkansas, Delaware, New Jersey, New Hampshire and Oklahoma – have passed such laws.

"To date, at least 17 insurers have chosen to incorporate under these statutes with additional insurers planning on doing so," Maier said.

Senator James Seward, R-Oneonta, praised the measure. "Six other states have already changed their laws to allow an admitted carrier to also write coverage in their home state. Adopting this measure in New York will lead to efficiencies, cost reductions for insurers and policyholders, and economic growth," he said.

The bill recently moved out of the Senate Insurance Committee and is now before the Senate Finance Committee.

The Assembly companion legislation (A.9783) has not yet moved.

ELANY ELECTRONIC FILING SYSTEM (EEFS)

ELANY now stands just seven percentage points shy of the goal of universal electronic affidavit submission and looks forward to that in the not-too-distant future.

The latest data, encompassing the first five months of this year, shows 93.42% of the total of 64,405 affidavits filed were submitted electronically.

The percentage of total brokers submitting transactions electronically now stands at 79%, which would seem to indicate some of the less active brokers have yet to climb on board the electronic bandwagon.

While the amount of total affidavits filed year over year is approximately the same, the percentage of brokers filing electronically has jumped seven points from 72% for all of 2011 to the 79% figure as of May 2012.

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"We are pleased to see that more and more brokers are now grasping the value of electronic filing and have made the switch," said Brian Persaud, ELANY Information Technology Manager.

Electronic filing eliminates many of the sources of human error in the filing process starting at the broker level, where filers are freed from the tedious task of searching various codes for carriers and coverages.

"ELANY has implemented business rules into the EEFS processes that validates various data elements and catches clerical errors that can still be made whenever there is the human element involved," Persaud said. "Thus, we can further concentrate our efforts on the bigger picture, ensuring the brokers are following the insurance law to the letter and spirit of the law as it pertains to compliance in the E&S market."

Persaud said one of the resulting benefits of electronic filing is ELANY examiners are now reviewing an average of 60 to 65 transactions per day, compared to an average of 40 to 45 per day prior to the implementation of the EEFS, a significant increase in productivity.

That figure becomes all the more critical when you compare just over 66,317 transactions were filed in 1997 compared to 214,478 transactions

filed last year. "We now can perform our critical regulatory examination duties more efficiently and economically while improving the turnaround time for transactions. A recent analyses revealed over 85% of transactions are consistently returned within 24 to 48 hours of submission" said Persaud.

Additionally, ELANY created an electronic submission process for Purchasing Group (PG) business, which represents about 10% of the overall transactions in a given year. Currently, 60% of all PG transactions are being submitted electronically.

Persaud also said that since the deployment of the ELANY Electronic Filing System (EEFS), ELANY has lowered the late filing rate to an average of 6% annually. "There is no doubt that electronic filing has supported this welcome trend," he said.

ELANY has a few brokers who have been filing programmatically for a number of years and a handful more in the testing stages. This computer-to-computer methodology of filing is the most efficient manner available. We are working with software vendors to create a fully programmatic filing module for agency management platforms in the marketplace. Once tested and deployed, it will result in a tremendous increase in the number of programmatic filings. Twelve percent of all affidavits submitted were filed programmatically last year.

ELANY REPORT ON EXAMINATION

Broker Declination Procedures Remains a Department Concern

ELANY recently received its Report on Examination from the New York State Department of Financial Services' Insurance Division. One of the concerns raised by the Department was where notice of excess line placement dates or policy inception dates preceded one or more declination dates. The Department

asserts that if declinations are acquired after an excess line placement is made, the placement may violate the excess line law. While such date issues may be only an administrative error, brokers would be wise to review internal procedures and avoid the negative inferences drawn.

ELANY WEBSITE UPDATE

ELANY has recently revised its Education/Training videos currently contained in its Video Library to take into account changes caused by implementation of Non Admitted Reinsurance Reform Act (NRRRA) and the merger of the NYS Insurance Department into the NYS Department of Financial Services.

The ELANY Video Library currently contains nine Education/Training videos on the following topics:

- **A Five Minute Overview of the Excess Line Market** (5 minutes)
- **Diligent Search and the Reason to Believe Standard** (6 minutes)
- **How to Complete and File an Excess Line Premium Tax Statement** (6 minutes)
- **Fees Which Can be Charged on NY Excess Line Transactions** (3 minutes)
- **Excess Line Broker Licensing Requirements** (5 minutes)
- **Taxes and Assessments on Excess Line and Other Non-admitted Transactions** (8 minutes)
- **Signing Up to Use ELANY's Electronic Filing System** (4 minutes)
- **Using the E-filing Affidavit System—a Training Video** (13 minutes)
- **ELANY at a Glance** (7 minutes)

ELANY STAFF PICTURES OF NY GIANTS SUPER BOWL VICTORY PARADE CELEBRATION – FEBRUARY 7, 2012



CALENDAR OF EVENTS

July

Thursday - Sunday
July 12 - July 15

**National Conference of Insurance
Legislators (NCOIL)**
Summer Meeting
Hilton Burlington
Burlington, Vermont

Tuesday - Thursday
July 25 - July 28

**Western States Surplus Lines
Conference (WSSLC)**
St. Regis Monarch Beach Resort
Dana Point, California

August

Saturday - Tuesday
August 11 - August 14

**National Association of Insurance
Commissioners (NAIC)**
Summer Meeting
Atlanta Marriott Marquis
Atlanta, Georgia

September

Thursday - Friday
September 27 - September 28

**Surplus Lines Law Group Fall Meeting
(SLLG)**
Beau Rivage Resort
Biloxi, Mississippi

October

Monday - Thursday
October 8 - October 11

**National Association of Professional
Surplus Lines Offices (NAPSLO)**
Annual Convention
Atlanta, Georgia

Tuesday
October 30

**Professional Insurance Agents of New
York (PIANY)**
Hudson Valley Rap
Doubletree Hotel Tarrytown
Tarrytown, New York

November

Thursday - Sunday
November 15 - November 18

**National Conference of Insurance
Legislators (NCOIL)**
Annual Meeting
Grand Hotel Marriott Resort
Point Clear, Alabama

Thursday - Sunday
November 29 - December 2

**National Association of Insurance
Commissioners**
Fall Meeting
Gaylord National Hotel and
Convention Center
Washington, D.C.

EARLY WARNING REMINDER

Remember To Renew Your Excess Line Broker Licenses.



All current excess line broker business entity licenses (corporation, LLC, or partnership) expire on October 31, 2012.

Please note that **individual excess line broker licenses** expire on the licensee's birthday in even numbered years for individuals born in even numbered years and in odd numbered years for those born in odd numbered years.

AND THANKS TO...

ELANY wants to express our appreciation to Steve Tuckey, who assisted in writing this edition of the E&S Empire Express. Steve has written on insurance issues for more than ten years for several national media outlets.



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