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The E&S Empire Express

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DAVE ISENBERG

INSURANCE LEGEND AND TRUE PROFESSIONAL

For most folks, 50 years on the job might signal a time to call it quits. But if not for Dave Isenberg's failing kidneys, he still might be schlepping out to Long Beach every day fighting the good fight in the wholesale insurance agency world and loving every minute of it.

Even with his dialysis treatments, Dave sits on numerous boards including ELANY, PIA and the Russell Bond Agency in Buffalo, where that hard earned wisdom helps make sense of a complex business.

Dave retired as president of the D.C. White Agency in January, just shy of his 35th year on the job, where his expertise in commercial auto and related business, combined with his fiercely loyal friendships, created the kind of career satisfaction that seems out of date in today's employment world.

"I am unusual in this business in that I never wanted to move around. In 50 years, I have only changed jobs once," he said.

Dave grew up in Long Beach, where numerous family members were in the automobile retail business. But he took the advice of an uncle who said "if you go into insurance, you will always have a career where you can take your skills with you wherever you go."

Dave joined regional insurer Consolidated Mutual following graduation from Hofstra University, first as a marketer and then underwriter. After 17 years, he took a position with the D.C. White Agency, one of New York's leading wholesalers.

But that did not mean the end of his underwriting days as the agency became one of the few wholesalers to venture into risk-taking.

And in defiance of that old saw that those that can't do, teach, Dave joined the faculty of the College of Insurance to share his enthusiasm for the industry with new crops of brokers and insurer employees.

Dave added a new dimension to his career with the creation of the New York Insurance Exchange and spent almost nine years placing excess and surplus lines business there. D.C. White became the leading broker on the Exchange for placement of direct business.

Like most college grads looking to make their mark in the world, insurance did not top Dave's list for a career. And while the business obviously fascinates him, it is that almost indescribable bond with his fellow employees and clients that made his long career an amazing experience. "Many of my customers, and even my competitors, have become my close personal friends," he said.

Dave recalled when the passing of one wholesaler prematurely presented an opportunity for his rivals to swoop in while his young son got up to speed. "But instead of that, many ended up helping with advice and friendship," he said.

In fact, his close tennis friendship with the president of Lancer Financial Group proved vital in smoothing that transition when the carrier specializing in passenger transportation risks purchased D.C. White in 1997, which by then was headed up by Dave.

"I find that the manner in which people play sports tells a lot about how a person will act in business," he said. "If a person cheats at tennis or golf, he will probably cheat in business."

It was at Lancer that Dave first became acquainted with ELANY Executive Director, Dan Maher, where he served as general counsel. "At Lancer, Dave would ask me for legal research on insurance matters at the PHD level. I was always challenged by Dave's depth of knowledge and his pursuit of even more. In any event, no one brought more to the table nor shared his knowledge more generously at Lancer or ELANY than Dave," Maher said.

Dave joined the ELANY Board the year after Dan became executive director in 1997 and chaired several committees before becoming chairman in

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2004. "My experience on the ELANY Board has been one of the most rewarding in my 50 years in the industry," he said.

Dave recently celebrated his 49th year of marriage to his wife, Arlene, who taught special education in the New York City school system for 27 years. They raised their three children in Rockville Centre and moved to Manhattan in 2000.

By now, Dave should be settled in at his new home in West Hartford, where he and Arlene will spend the rest of their days near their children and grandchildren.

Dave's current passion is helping families with children who have learning disabilities. At a recent PIA award presentation, he disclosed his dyslexia and attention deficit disorder as a child. "It is heart-breaking to learn how many children have learning issues," he said.

And who says retirement means you can't delve into new areas of interests?

In order to help Dave pass the time during his thrice weekly three hour dialysis sessions, Arlene presented him with the bondage thriller "50 Shades of Gray" for his I-Pad. "The staff was really hysterical," he recalled.

But just to make sure he does not make the machines go all haywire, he balances that with some insurance-related reading during his sessions.

REGULATION 41 RE-WRITE

ELANY officials have been hard at work for the last several weeks drafting a revised New York State Department of Financial Services (DFS) regulation that will once and for all conform to the post Nonadmitted and Reinsurance Reform Act (NRRA) world.

"Brokers today remain in the very difficult situation of having to adhere to state rules regarding obtaining carrier financial eligibility information that carriers insist they are not required to provide under NRRA preemption rules," said ELANY Executive Director, Dan Maher.

While Maher has been working with state regulators over the past couple of years to develop a workable solution, the state put the ball in ELANY's court this summer and asked them to rewrite a portion of Regulation 41 that will provide brokers a specific methodology to protect themselves from negligence allegations when it comes to procuring coverage for their clients.

Maher said the new regulation should perform the tricky balancing act of taking into account the NRRA preemptions, while at the same time providing access to financial data needed for the kind of thorough solvency review that is key to consumer protection.

"The NRRA treats alien insurer eligibility and foreign insurer eligibility quite differently," Maher said. "Therefore, the amendments to Regulation 41 will also need to make significant distinctions between the two categories."

Now that the National Association of Insurance Commissioners (NAIC) sponsored International Insurers Department (IID) has become the exclusive gatekeeper for alien insurer eligibility, Maher said that he has encouraged the DFS to initiate efforts within the NAIC to bolster alien financial disclosure requirements to bring them in line with those required of foreign insurers.

Maher said that foreign insurers should still be required to file annual and quarterly statutory and GAAP financial statements to gain eligibility with ELANY and demonstrate that the insurer meets the $45 million policyholders' surplus standard, as this is not preempted by NRRA.

While three-year prospective business plans and reinsurance summaries can be helpful in analyzing financial solvency and assisting insurers in avoiding compliance problems, they appear to be pre-empted for foreign insurers under NRRA. "But they could be implemented as an IID requirement for aliens or if national uniform eligibility standards are developed as permitted by the NRRA for foreign insurers," Maher said.

As to certifications dealing with advertising prohibitions and the fact that payment to the broker constitutes payment to the carrier, Maher said that at a minimum, Regulation 41 must be rewritten to eliminate them as obligations of excess line brokers. "To the extent the NRRA pre-empts state specific eligibility standards, excess line brokers are powerless to compel insurers to behave in specific manners mandated by Regulation 41," he said.

The IID requirement for alien insurers to fund a trust could be strengthened by requiring both consent to jurisdiction in any U.S. court and banning any mandatory offshore arbitration provision in excess and surplus lines policies.

Maher said that ELANY will continue to conduct solvency reviews of eligible insurers in the name of consumer protection but will have to look for new data sources. To that end, he suggested that the IID require alien insurers to post all data on a public website and to bolster alien disclosure requirements to match those of foreign insurers.

"When this regulation is amended and on the books, we hope that brokers will be able to focus more specifically on providing the best possible service to their customers without any needless worry that they are running afoul of state regulation," Maher said.

NRRA UNIFORMITY EFFORT

Don't expect much movement in the effort to gain uniformity when it comes to distribution of excess line risk tax premiums, said one expert who has been close to the issue for a decade now.

Rick Masters, who has served as special counsel to the Council of State Governments (CSG) for the last 15 years, sees the current election year frenzy as diminishing the appetite of federal lawmakers to step in and prod the states on the issue of standardizing the system of excess line premium tax distribution.

And he believes that is probably the only motivating force that will change the current system, which presently has the states divided into three sectors.

In 2010, Congress passed the Non Admitted and Reinsurance Reform Act that called for 100% of the excess line premium tax to go to the home state of the insured. But it permitted the states to come up with some mechanism to share the revenues of multi-state risks, which the states have been trying, without much success, to do for the past two years.

"I believe it is the case in excess line insurance, as it is in many other areas of interstate regulation, that the threat of a federal takeover would be the most powerful motivator to get all parties to agree on one mechanism," Masters said. "But there does not seem to be any real interest in forcing the issue on the part of the feds."

As of today, three systems of tax allocation are in place with 35 states going the 100% home state collection route, nine states taking part in the Surplus Lines Insurance Multi-State Compliance Compact (SLIMPACT), and five states taking part in the Non-Admitted Insurance Multi-State Agreement (NIMA).

But in reality, there are only two systems as the nine-state roster for SLIMPACT puts it just one short needed for implementation, while there appears to be no action in any state at the moment that would achieve the magic number.

With some obvious exceptions, Masters said that "most states cannot be really certain as to whether they would be winners or losers in a 100% home state tax system or one that shares revenues depending on where the risk is located."

He sees the exit of six states from NIMA in the past year as indicative of that group's main drawback. "It is not really a compact but more of an agreement among state insurance departments to share revenue, which states can opt out of the minute they feel they are getting the short end of the stick when it comes to excess line premium revenue."

SLIMPACT has had the support of the National Conference of Insurance Legislators (NCOIL), the National Conference of State Legislatures (NCSL), ELANY and the National Association of Professional Surplus Lines Offices (NAPSLO), among others.

Masters said that instead of going the compact route, as it did when it came to the challenge of standardizing life product review procedures (resulting in the Interstate Insurance Product Regulation Compact), "certain states within the NAIC decided to go another direction," and ended up with NIMA.

"Both industry and regulators seem to agree that uniformity in the excess line industry, which would eliminate duplicative and sometimes conflicting regulation, is the ideal. Unfortunately, the uncertainty as to the revenue impact of 'sharing' excess line premium taxes on individual states has impeded progress toward that goal; and unless sufficiently motivated by a force such as the threat of intervention by the federal government, additional progress seems unlikely," he said.

From the broker perspective, Lockton Companies Vice President, Dennis Burden, expressed frustration that two years after NRRA passage "there has been much confusion and a very cumbersome process in certain states that still exists today."

Burden chalks this up to "several states that continue to be stubborn about accepting the federal legislation for which it was intended and making it cumbersome and more expensive for brokers and their clients to process taxes via a clearinghouse process."

He said what he termed the additional cost of the clearinghouse fee "not palatable to brokers, and certainly there could be pushback from our insureds when we have to ask them to pay yet another fee on top of taxes they are currently responsible for."

Burden attributed the withdrawal of several states from NIMA to the "foresight to see that it would not yield them the tax revenues they originally thought it would produce."

While originally favoring SLIMPACT, Burden sees all 50 states going the 100% collection route as the ideal outcome.

"For years, surplus lines taxing was cumbersome, clumsy and very messy, and often horribly inaccurate. Dodd Frank took us out of the Dark Ages and gave us the path to making it much more streamlined and simple," Burden said.

He went on to say, "however, a few states have muddied the waters, in my opinion, simply due to the fact that they feel their tax revenue stream would be shortened by not being part of a tax sharing system. This system is problematic for yet another process to have brokers handle adds an additional cost to the insured, which has the potential of alienating an insured in what they often feel is an expensive market and process."

Burden's support for the 100% route reflects the feeling among many former supporters of SLIMPACT, who felt it was a great solution for the first decade of the century when the NRRA was nothing but a gleam in the lawmakers' eyes but lost its luster once the legislation, signed into law two years ago, seemed to have solved the problem.

In any event, since SLIMPACT appears dead in the water, the question becomes how to make the best situation out of the current reality.

Of course, the problem remains while NIMA hangs on. Some observers see it as the main repository of the dreams of Florida regulators to turn the Florida Office of Insurance Regulation (FLOIR) into something resembling a national stamping office.

WHAT IS THE STAMP ON AN EXCESS LINE POLICY FOR?

ELANY recently responded to a question that a broker was asked by an insured who wanted to know, "What is the stamp on an excess line policy for?" There are actually two different "stamps" that are required to be put on an excess line policy.

1) Excess Line Broker Stamp

The excess line broker is required [per Sections 27.17 and 27.18 of Reg. 41] to put the following stamped "disclosure language" on every excess line insurance policy, memorandum, certificate, confirmation of coverage or other document evidencing insurance coverage placed with an eligible excess line insurer and delivered to a New York insured:

"THE INSURER(S) NAMED HEREIN IS (ARE) NOT LICENSED BY THE STATE OF NEW YORK, NOT SUBJECT TO ITS SUPERVISION, AND IN THE EVENT OF THE INSOLVENCY OF THE INSURER(S), NOT PROTECTED BY THE NEW YORK STATE SECURITY FUNDS. THE POLICY MAY NOT BE SUBJECT TO ALL OF THE REGULATIONS OF THE DEPARTMENT OF FINANCIAL SERVICES PERTAINING TO POLICY FORMS."

This required disclosure language provides notification to the insured consumer that the excess line insurer providing them insurance coverage is not protected by the state security funds in case of insolvency and not subject to all of the supervision and regulatory requirements of the Department of Financial Services (DFS). This consumer protection disclosure language is in addition to the "Notice of Excess Line Placement" advisement memo that must be given to every New York insured that is placed in the excess line market.

It should be noted that the stamped disclosure language and the "Notice of Excess Line Placement" memo also provides protection to the excess line broker and producing broker if at a later date the insured complains to the DFS that they were never advised that their insurance policy was being placed with an eligible excess line insurer.

The above-noted excess line broker disclosure language usually initiates most of the questions and concerns that insured consumers have with regards to coverage being placed with an eligible excess line insurer.

2) ELANY Stamp

The second "stamp" that is required [per Section 2118(b)(6)of the NYIL] to be placed on every excess line insurance policy is the stamped language that ELANY must place on the policy which reads as follows:

"This is to certify that Excess Line Association of New York received and reviewed the attached insurance document in accordance with Article 21 of the New York State Insurance Law."

This stamp indicates that the affidavits and related insurance documents submitted to ELANY by the New York licensed excess line broker for review and filing were examined, and it was determined that the excess line transaction was examined by ELANY for compliance with the applicable excess line laws and regulations of New York.

Section 2118(b)(6) of the New York Insurance Law advises that it is unlawful for an excess line broker to deliver in this state any declarations page or cover note unless such insurance document is stamped by the excess line association. Additionally, Section 27.6 (b) of Regulation 41 states that, "an excess line broker shall not deliver, or provide to any producing broker for delivery, an excess line insurance policy declarations page or cover note unless the first page of the declarations page or cover note bears the stamp applied by the excess line association or a duplicate copy of the declarations page or cover note bearing the stamp is attached to the original."

The review and examination of required affidavits and related insurance documents by ELANY to verify licensee compliance with applicable

New York excess line laws and regulations and subsequent placement of the ELANY stamp on these insurance documents is what generates the "stamping" fees that are paid to ELANY by the New York licensed excess line broker.

The disclosure by the broker and the review by ELANY help protect New York citizens by 1) making them aware of the potential risks involving E&S coverage, and 2) establishing a level of oversight to make sure the E&S market is used only in accordance with New York excess line laws and regulations.

NAPSLO/A.M. BEST WEBINAR:

"INSIDE TODAY'S SURPLUS LINES MARKET"

While the Domestic Professional Surplus Lines industry may have enjoyed its first recent year-over-year increase in direct premium written (3.2%) in 2011 compared to the previous year, the champagne celebrating a hard market will remain on ice for the time being.

The trend continued in the first quarter of this year with direct premiums written (DPW) rising 7% compared to the same year ago period, according to the annual A.M. Best surplus lines report, issued October 1.

Industry experts taking part in the annual A.M. Best webinar coinciding the with report's publication see some rate increases in pockets in the industry, but no across-the-board rate firming that would indicate the onset of a hard market.

Maureen Caviston, President of Partners Specialty Group and former president of the National Association of Professional Surplus Lines Offices (NAPSLO), cited New York construction and heavy transportation wheels exposure as exceptions to the rule of plentiful capacity. "Overall, rates are going in the right direction, but I would not characterize it as a hard market," she said.

The Best Report confirmed that as a result of New York's higher limits and litigious tendencies, fewer insurers are willing to write the coverage. "Liability insurance has gotten so expensive, with rate hikes in the 30%-40% range, that contractors are said to be going without coverage or closing their businesses," the report stated.

David Bresnahan, President of Lexington Insurance Company, added national account umbrella, railroad, and life sciences as additional areas of firm rate increases in a market that has yet to move significantly overall to hard status. "It is not really the balance sheets but rather the income statement that is driving the rate changes," he said.

He said carrier management is "changing the goal posts as it pertains to how low a combined ratio you need to write in order to generate a satisfactory return."

"There are many underwriters not too excited about pricing levels," he said.

NAPSLO Executive Director Brady Kelley said "I think there is some hope we might see a dynamic shift in the market but many of our members believe that is dependent on an overall shift in the economy."

Robert Sargent, President of Tennant Risk Services and 2011/2012 NAPSLO president, said a number of companies have disappeared over the past few years in a spate of consolidation. "But out of that have come some entrepreneurial wholesale brokers who have started their own operations," he said.

While the domestic surplus lines industry premiums rose 3.2% last year, the global industry figure declined by 1.8%. The Best Report attributed that to a 32.5% decline in DPW by non-Lloyd alien insurance companies. In addition, the performance of surplus lines companies continued to outpace the property-casualty market in general, with the margin widening in 2011, after years of some contracting.

While the jury is still out on 2012 catastrophe losses, Bresnahan noted that the historic catastrophe losses last year "blew out the strategy that said you should have a great diversification of risks."

"The more diversified you were, the more losses you took over the year," he said.

"Tougher standards in the admitted insurance market have led to new opportunities for surplus lines carriers in areas such as small to medium size law practices and real estate practices," Sargent said.

"Private company and nonprofit directors and officers insurance has been a profitable area for his brokers for some time now. But those results have been eroding due to breach of contract in some of the EPL claims, which can be seen as a result of economic conditions," Sargent said.

Bresnahan said property remained the only area of where more business was written this year than in 2011.

The Best Report concluded that competition from the standard market for moderate and higher hazard risks has served to compress prices in the surplus lines market. "When market conditions harden traditional standard market carriers tend to turn away from more traditional surplus lines risk to refocus on their core business," the report stated.

Intermediaries' renewal retention rates remain steady, according to the report. "For the most part, business is staying with the incumbent carrier because although insurers want to get increases where they can, they don't want to lose the business altogether, so they are willing to bend on terms and conditions," it stated.

All these trends have created opportunities for wholesalers to consider new initiatives, some with higher risk, such as program business, captives, or forming relationships with retailers with revenues of under $100 million.

And so with more business finding its way to the surplus lines market, the report noted, intermediaries are seeing the need for rejuvenating the talent pool. "There is more awareness among surplus lines intermediaries of the need to develop surplus lines specialists, especially because so much of the existing talent is older and getting ready to leave the business."

DOMESTIC EXCESS LINE INSURER LEGISLATION

The New York State Assembly will in all likelihood consider legislation next year to allow the establishment of domestic excess line carriers able to write risks based in New York.

The ELANY proposed legislation, according to Executive Director Dan Maher, will help create jobs by facilitating New York carriers to expand their operations.

The legislation passed the Senate earlier this year under the sponsorship of Senator James Seward, R-Oneonta, who said the economic benefits to the state justified its enactment.

The Assembly failed to act on the measure during the 2012 session. New York City based insurance regulatory attorney, Peter Bickford, said he understands the proposal will face a vote next year but would not in all likelihood make it on to the calendar if there is a special post-election session next month.

Bickford said the absence of the Department of Financial Services (DFS) to weigh in on the proposal was one factor in the lower house not acting on the measure.

"It is hoped that such support will be forthcoming but there are still some issues that have to be addressed," he said.

Bickford said those issues include defining the extent to which excess line carriers should be exempt from insurance law provisions applicable to traditional insurance carriers, and the role of excess line brokers in relation to the new class of carriers.

There is a lot of support for this legislation in New York and no private sector opposition; only questions about its scope and implementation. Questions which, we believe, can be addressed to satisfy the concerns.

Several states have already adopted similar legislation, including Illinois where the legislation has been on the books since 1998 and 13 domestic excess line companies have been set up. "The concept of a domestic excess line carrier can have a far greater cachet to insular New York and help regain its status as an industry innovator and leader for unique market options such as the Free Trade Zone or an insurance risk exchange," Bickford said in last month's edition of *Insurance Advocate*.

The New York Free Trade Zone offers admitted carriers a way to write some risk traditionally outside of their parameters through a special risk license, although without all the freedom provided to the non-admitted companies.

Bickford said the domestic excess line legislation is a logical extension of the Free Trade Zone concept "that could lead to a greater expansion of available capacity for hard to place or large commercial risks while maintaining direct regulatory control over the financial stability and solvency of carriers."

The Insurance Committee of the New York City Bar Association supports the domestic excess line company measure but expressed concern that it could raise the specter that the state has approved a new, less regulated class of insurer to compete with the admitted market.

EXCESS LINE BROKER LICENSING RENEWAL 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.

2012 CALENDAR OF EVENTS

October	
Monday–Thursday October 8–October 11	**National Association of Professional Surplus Lines Offices (NAPSLO)** Annual Convention Atlanta Marriott Marquis & Hyatt Regency Atlanta Atlanta, GA
Thursday October 18	**Insurance Brokers' Association of the State of New York (IBANY)** Annual Fall Reception Bridgewaters, South Street Seaport, NY
Tuesday October 30	**Professional Insurance Agents of New York (PIANY)** Hudson Valley Rap Doubletree Hotel Tarrytown Tarrytown, New York
November	
Wednesday November 7	**Professional Insurance Wholesalers Association of New York (PWIA)** Annual Recognition Dinner Battery Gardens, NY
Thursday–Sunday November 15–November 18	**National Conference of Insurance Legislators (NCOIL)** Annual Meeting Grand Hotel Marriott Resort Point Clear, Alabama
Friday November 16	**Council of Insurance Brokers of Greater New York** (CIBGNY) Annual Dinner El Caribe, Brooklyn, NY
Thursday–Sunday November 29–December 2	**National Association of Insurance Commissioners (NAIC)** Fall Meeting Gaylord National Hotel and Convention Center Washington, D.C.

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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