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The E&S Empire Express

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THE NON-ADMITTED AND REINSURANCE REFORM ACT OF 2007 (HR1065) VS THE COMPACT

These are exciting times for the E&S industry with Congress reintroducing reform legislation and with a broad based group of industry representatives and regulators releasing a draft E&S Interstate Compact.

The question that is being asked repeatedly is, how does the compact and HR1065 relate to each other or how do they differ? Set forth below is a comparative analysis for your consideration.

exciting times for the E&S industry

HR1065—Section 101 Provides that,

Only the home state of the insured may require a premium tax payment. The states MAY enter into a compact or otherwise establish procedures to allocate those premium taxes. Congress intends that each state adopt a nationwide or uniform procedure such as an interstate compact that provides for the reporting, payment, collection and allocation of premium taxes. Home states can require tax allocation reports.

HR1065—Section 102

Only the insured's home state's statutory and regulatory requirements apply, including those with regard to producer licensing, all non home state, non-admitted insurance laws and regulations are preempted. Workers' Compensation insurance is not subject to preemption, however.

E&S Interstate Compact

The draft compact similarly provides that the insured's home state law applies exclusively to a multistate E&S transaction. The Compact Commission would require each compacting state to collect allocation information from the broker for the portions of the risk in each state. The Compact Commission would adopt uniform allocation formulas and each state through their stamping office, insurance department or other agent would report the data to a clearinghouse created by the compact. The clearinghouse would share data with the states and brokers so all parties would know what is owed to each state. The compact, unlike HR1065, does not require taxes to be paid to the home state for redistribution.

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HR1065—Section 103

States must participate in the NAIC or any other national producer database within a set time frame or those non-participating states will not be allowed to collect licensing fees from surplus lines brokers.

E&S Interstate Compact

The compact contains no similar provision.

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HR1065—Section 104

U.S. domiciled insurers become eligible to write surplus lines insurance by reporting the insurer has $15,000,000 of policyholder's surplus. Alien insurers become eligible by meeting the filing and

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COME ONE, COME ALL TO ELANY'S ANNUAL MEMBERS MEETING

ELANY has scheduled its Annual Members meeting on Wednesday, May 9th, at the Battery Gardens Restaurant located on the very southern tip of Manhattan in beautiful Battery Park.

In addition to the opportunity to network with friends, colleagues and fellow members, an exciting program is planned.

New York's new Superintendent of Insurance, Eric Dinallo, recently appointed by Governor Elliot Spitzer, has been invited to be our keynote speaker. The Superintendent's history as Willis Group's General Counsel and prior experience as an Assistant Attorney General in the State of New York will make his take on the E&S market most interesting.

So come for the networking opportunities, or come for the free lunch or meet the new Superintendent or even stare out the windows, watch the boats go by and wish you were on one…If you show, we'll still come by and say hello.

Look for ELANY Bulletin No. 2007-07, to register to attend and make your lunch selection. Seating may be limited so don't delay.

Inside…

HR1065

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trust fund requirements of the International Insurers Department (IID) of the NAIC.

E&S Interstate Compact

The compact, unlike HR1065, would not eliminate the extensive analysis many states currently conduct before granting an insurer eligibility to write surplus lines insurance. Instead the compact authorizes the Compact Commission to adopt uniform standards of eligibility if two thirds of the compacting states agree to the uniform standard.

The compact authorizes the Compact Commission to create uniform standards in numerous areas of surplus lines regulation. Even when two thirds of compacting states adopt a uniform standard, a state may "opt out" of the standard rather than opting out of the entire compact.

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HR1065—Section 105

Insureds which meet a substantial definition of sophistication and financial wherewithal can consent to coverage being acquired from surplus lines insurers without the broker having to first conduct a diligent search. These are exempt commercial purchasers (ECPs).

E&S Interstate Compact

The compact allows the Commission to adopt a uniform standard regarding diligent search requirements and exemptions such as those for ECPs.

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HR1065—Section 106

The GAO/Comptroller General of the U.S. will conduct a study regarding the impact of HR1065 on the marketplace once the law is passed.

E&S Interstate Compact

No similar provision is contained in the compact.

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HR1065—Section 107

This section of definitions contains at least two definitions that are remarkable. "Premium Tax" refers to taxes, assessments and charges imposed by a state on an insured. Since many states impose the tax on surplus lines licensees, the definition appears deficient. "Home state" is defined for commercial entities as the "principal place of business".

E&S Interstate Compact

The compact includes taxes on E&S brokers in its tax definition. The compact has a more definitive definition of home state.

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E&S Interstate Compact

The compact provides that the commission by two thirds majority can adopt uniform standards to reduce the extreme differences in compliance standards from state to state and make compliance easier by providing one consistent set of standards to E&S brokers who place risks in many different states.

The uniform standards would address such things as diligent search and exemptions, the required disclosure language, insurer eligibility, filing procedures, tax collection and payment due dates. HR1065 does not provide similar provisions.

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Some Observations

- Either HR1065 or the compact would greatly improve marketplace efficiency by making it crystal clear that only the insured's home state can regulate any single multistate E&S transaction.
- HR1065 would eviscerate the current financial strength requirements and thorough analysis many states require as a prerequisite for insurer eligibility. These provisions of 1065 will ultimately lead to greater insurer insolvencies, increased broker liability and overall damage to the reputation of the E&S marketplace. Moreover, the question is begged why does anyone support these provisions? HR1065 should reform market inefficiencies but not destroy important consumer protections.
- HR1065 requires tax payments to the home state and while it intends that the states agree to share the taxes, it does not appear to force the states to do so nor sanction them if they fail to do so. It is possible that different groups of states could attempt to address this portion of HR1065 in different ways, failing to achieve uniformity.
- The compact's mandatory rules would address fair apportionment of taxes to each state but only to the extent states adopt the compact. The compact approach would allow each state to charge its tax rate to the portion of risk in that state. Also, while the compact calls for uniform standards to bring a more uniform approach from state to state, the Compact Commission may adopt such standards but would not be required to.
- HR1065 definitions need some work as noted above.
- Either HR1065 or the compact could be enacted and operate independently of each other. If ultimately both are passed into law, since 1065 calls for a device such as a compact to deliver the goals of 1065, HR1065, the compact, or both would need to be amended to allow them to dovetail and work together.
- ELANY supports the concepts contained in both the compact and HR1065 but believes HR1065 needs to be amended in several respects to maximize the value it brings to the market and to restore eligibility standards with consumer protection in mind.
- If you wish to review a current copy of the draft compact or HR 1065, please contact Janette Perez at jperez@elany.org.

FINANCIAL STRENGTH MEANS CONSUMER PROTECTION

by Richard Schlesinger

If the Non Admitted and Reinsurance Reform Act becomes law, almost all discretion as to which insurers become eligible to write surplus lines will be eliminated. ELANY views financial analysis as a vital component of its responsibilities to its member brokers and to insurance buyers. Even though the ultimate responsibility for choosing companies belongs to the licensed New York excess line brokers, ELANY establishes an eligibility list and monitors all companies currently eligible. Insurers seeking eligibility in New York must make an application to ELANY. Eligible companies are reviewed annually for continuing eligibility and are required to file various financial data, a three year business plan and other important documentation which ELANY analyzes to gauge the financial strength of each insurer.

Since ELANY's formation many companies have sought eligibility. ELANY, philosophically, will add any insurer that clearly meets the established financial strength requirements. On the other hand a number of applicants which appeared to meet the requirements for eligibility, did not hold up to ELANY's thorough review process. Some applicants did not meet the standards for reasons that include financial weakness at the company or holding company level due to a high debt level, potential reinsurance recoverable problems, poor liquidity, adverse loss development or other noted financial weaknesses.

A brief history of some companies that have been **denied** eligibility by ELANY is illustrative: Independence Indemnity Insurance Company whose application was deferred in 2000 and at that time was rated "A-" by A.M. Best, was put into rehabilitation in 2001. Paradigm Insurance Company applied in 1996 and at that time was rated "B++" by A.M. Best and reapplied in 1998 when it was also rated "B++" by A.M. Best and was deferred both times. The company was put under supervision in 1999 and placed in liquidation in 2001. Four Illinois Insurance Exchange Syndicates applied for eligibility in 1994; no member of the Illinois Insurance Exchange was ever granted eligibility. While the applicants appeared to exceed the minimum requirements for eligibility at the time of application, ELANY determined that financial trouble was on the horizon. An analytical review is an essential obligation to prevent applicants with financial issues, as exemplified by the companies above, from becoming eligible and putting New York insureds in potential danger of having claims go unpaid. Eligibility standards without a review process will ***not*** keep insurers with material financial issues out of New York.

ELANY's annual requalification requirements provides continuous financial review of eligible companies.

ELANY's annual requalification requirements provides continuous financial review of eligible companies. This proactive effort enables ELANY to ask eligible companies, where perceived weakness has been established, to voluntarily withdraw their eligibility. This protects ELANY's members from exposing insureds to problems before official regulatory notice has been given. This is extremely important as there are no guaranty funds in New York for excess line policies.

ELANY's proactive and vigorous financial analysis has resulted in the timely withdrawal of eligibility in the following cases:

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ELANY Calendar

Don't miss these upcoming industry events:

PIA LIRAP — **April 19, 2007**
Leonard's of Great Neck
555 Northern Boulevard
Great Neck, NY

IBANY Spring Reception — **April 26, 2007**
Bridgewaters
11 Fulton Street
New York, NY

PIWA Midyear Convention — **May 2–3, 2007**
The Hilton at Pearl River
500 Veterans Memorial Drive
Pearl River, NY

ELANY Annual Members Meeting — **May 9, 2007**
Battery Gardens
Inside Battery Park, Opposite 17 State Street
New York, NY

PIA Annual Conference — **June 10–12, 2007**
Trump Taj Mahal
1000 Boardwalk at Virginia Avenue
Atlantic City, NJ

Western States Surplus Line Conference — **June 19–23, 2007**
The Hyatt Regency Scottsdale Resort & Spa
at Gainey Ranch
7500 E. Doubletree Ranch Road
Scottsdale, AZ

FINANCIAL STRENGTH

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- Alliance General Insurance Company was delisted on November 17, 1998 and went into liquidation on January 7, 2000.
- Alpine Insurance Company was delisted on April 19, 1996 and was put into conservation on May, 1998 and into liquidation on June 28, 2000.
- Andrew Weir Insurance Company, Ltd was delisted November 26, 1991 and entered into a scheme of arrangement in January, 1994.
- Frontier Pacific Insurance Company was delisted on March 31, 1997 and entered conservation on September 7, 2001 and went into liquidation on November 30, 2001.
- Legion Indemnity Company was delisted on April 9, 2002 and was put into liquidation on April 9, 2003.
- Reliance Insurance Company of Illinois was delisted September 25, 2000 and went into liquidation October 3, 2001.
- United Capitol Insurance Company was delisted July 14, 2000 and was put into conservation on September 12, 2001 and liquidation November 14, 2001.

ELANY's review process has either prevented or limited the number of insureds exposed to non payment of claims by insurer insolvency. Financial analysis is conducted to protect excess line insureds and claimants. **Insurer solvency is the ultimate consumer protection.**

From ELANY's IT Desk…

by Brian Persaud

INTERNAL UPDATES:

In May 2007, ELANY will replace its current internal data processing legacy system with a robust application built with state of the art technology. This deployment initially may not appear to have a direct impact on the broker community but you will soon realize its many benefits as it enhances our internal workflow and improves our efficiency. This is a preliminary implementation as we prepare to unveil a ***fully integrated system*** that will support programmatic filing and a newly designed completely electronic web-based Online Affidavit Generation system to be released in the 4th quarter of 2007.

ELANY dislikes returning incorrect or incomplete documents to you as much as you hate receiving them. To help alleviate this problem, we recommend that you aggressively encourage your producing brokers, where applicable, to use the Online system. As they begin to utilize the Online System, you will reap the many tangible benefits the system provides. For example, selecting an invalid declining company or company code will be a thing of the past as our system provides an up to date drop down list of licensed companies with their corresponding NAIC codes. ***Receipt of incomplete Part C affidavits is eliminated and data entry errors are significantly reduced.***

Additionally, retail brokers and users of the Online System have the ability to view their affidavits on-demand, even from home without any special requirements, just a computer with access to the Internet. Kindly have the retail brokers complete the sign up process by downloading and completing the Online Affidavit Generation Registration Form and emailing it to helpdesk@elany.org or faxing it to 646-292-5548. ***Excess line brokers*** who are not currently registered on the Online system are also welcome and encouraged to sign up to receive the benefits of the system.

PROGRAMMATIC FILING IN OUR CROSS-HAIRS…

We have just returned from the AAMGA/NAPSLO sponsored Automation Conference held from March 10th–13th, 2007 in Atlanta. We held productive meetings with a number of brokers, MGA's and their Agency Management System vendors, AMS, SkyWire (Docucorp), OMNI and Imageright to name a few. A number of brokers have been contacted as we embark on the discovery and design phase to create the "bridge application" between your Agency Management Systems and ELANY's new system. This will facilitate the much desired end-to-end programmatic filing. Over the next few months we will be publishing the required "data specs" and will make it available as we work together to accommodate your ability to submit all filings electronically. One of the incentives this provides is it will eliminate your need to "re-key" or re-enter data already in your system, thus improving your efficiency and productivity.

If you are interested in taking part in the initial discovery and design phase please contact our IT Manager, Brian Persaud at bpersaud@elany.org.

NEW YORK EXPORT LIST

Eric Dinallo, New York Superintendent of Insurance

In 1996, the New York Superintendent of Insurance exercised authority granted under §2118(b)(4), and recognized a number of insurance coverages were substantially and practically unavailable in the admitted market. In recognition of those facts, no diligent search of the admitted market and no declinations from admitted insurers were required for placing such coverages.

As the marketplace has changed, so have the types of coverage admitted insurers choose not to underwrite.

ELANY in a concerted effort with the Insurance Brokers Association of New York (IBANY), Professional Insurance Agents (PIA), Independent Insurance Agents Brokers of New York (IIABNY), National Association of Professional Surplus Line Offices (NAPSLO), Professional Insurance Wholesalers Association (PIWA) and Council of Insurance Brokers of Greater New York (CIBGNY), has asked the new Superintendent, Eric Dinallo, to review a list of coverages which brokers contend are unavailable in the admitted market and consider adding them to the export list. In order to do so, the Superintendent would have to call a hearing and take evidence to determine that these coverages are not generally available from licensed insurers. The coverages which have been submitted to the Superintendent for consideration are as follows:

As the marketplace has changed, so have the types of coverage admitted insurers choose not to underwrite.

EXPORT LIST Proposed Additions

Fire and Allied Lines

Vacant Property

Commercial property (within one mile of the ocean or a navigable waterway)

Commercial property (excess of $50,000,000 in underlying coverage)

Commercial property (where TIV>$200,000,000)

General Liability

Owners Landlord & Tenants

Manufacturers & Contractors

Contractors – all classes

Subcontractors – trades – all classes

Owners – contractors protective

Special Events

Excess/Umbrella

All classes excess of $10,000,000 underlying

Misc. E&O (including GL when combined)

Alcohol/Drug Rehab Centers/Programs

Convalescence, Nursing, Assisted Care Facilities

Day Care Centers (Adult, Child, Disabled)

Group Homes

Halfway Houses

Hospices

Social Service Agencies/Foster Care

Home Health Care Providers

Multiperil

Contractors – all classes

Subcontractors – trades – all classes

Prize Indemnification

Credit Insurance

Contract frustration (non-appearance coverage)

Employed Lawyers Liability