

The E&S Empire Express

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New York E&S Market Transactions for 2016

The New York E&S market set another new record for premiums (\$3,623,151,523) and for transactions processed totaling (303,303) in 2016. One of the leading causes for this growth has been the increase in construction projects due to the upturn in the New York economy as well as the ongoing completion of post superstorm Sandy commercial construction and infrastructure projects. Moreover, the admitted market is not encroaching on the traditional territory of the E&S market, which reflects the need for insurance expertise in the specialty classes of business serviced by the excess line market.

The total volume of premium written and number of transactions placed in the excess line market pales in comparison to the total amount of premium written (over \$43 billion) and transactions placed (over 15 million) in the admitted market.

A review of statistical information included in the "Statistics" section on ELANY's website demonstrated that the excess line market is a supplemental market and not one which competes head to head with the admitted or standard markets.

Retail brokers control which risks belong in the excess line market based on the best interest of their customers. They access the excess line market sometime directly but more often through wholesale brokers who bring expert knowledge to meet the needs of distressed, unique, emerging or capacity risks.

In Memory of Milt Thurm

By Daniel F. Maher, Executive Director ELANY

Milton Thurm, a well-known attorney and distinguished expert in all phases of insurance law practice and litigation, passed away recently at the age of 82. Many veterans of the industry knew Milt for these skills as well as approachability and his wise counsel. "Don't do anything until we talk to Milt," was a frequent industry refrain.

Long hours and hard work did not diminish Milt's devotion to the many other priorities he held dear. His family, wife Phyllis of 59 years, three very successful children, seven grandchildren, his friends, his colleagues and the communities in which he lived all received his attention, careful guidance and advice. He was tremendously generous with his time.

Milt was the President of Temple Israel in South Merrick for a number of years, as well as a Village judge in North Hills and Great Neck. Perhaps the only thing he hadn't quite mastered in his life was retirement. He continued to mediate commercial disputes in Florida until shortly before his death.

I knew Milt first as a friend of my father and later he employed me as a rookie lawyer (God bless him!). But it was after my father's death when my relationship with Milt could have faded; instead it grew stronger. Family dinners with Milt and Phyllis, my brother Mark and our spouses became the norm. Milt and Phyllis flew in from Florida just to attend a birthday party for my Mom's 70th. Milt took a keen interest in my children. We were friends for three generations.

Milt had a great sense of humor. He spoke of a case, where his client was not a white knight. He reported dutifully to his client, that the jury came back, the jurors had requited themselves well rendering a just and fair verdict. Milt had won but feigned a loss and told the client, "I wasn't looking for justice, I wanted to win! Let's appeal!"

When I think of him, I'll try to remember his wit and enjoy fond memories.



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ELANY Hits the Road

Annual Members' Meeting Held at Citi Field on May 10th

Approximately 100 members, insurer representatives, attorneys in the industry and others attended the ELANY Annual Members' Meeting, which was held on May 10, 2017 in the Honda Clubhouse at Citi Field, Flushing, New York, followed by a Mets vs. San Francisco Giants baseball game.

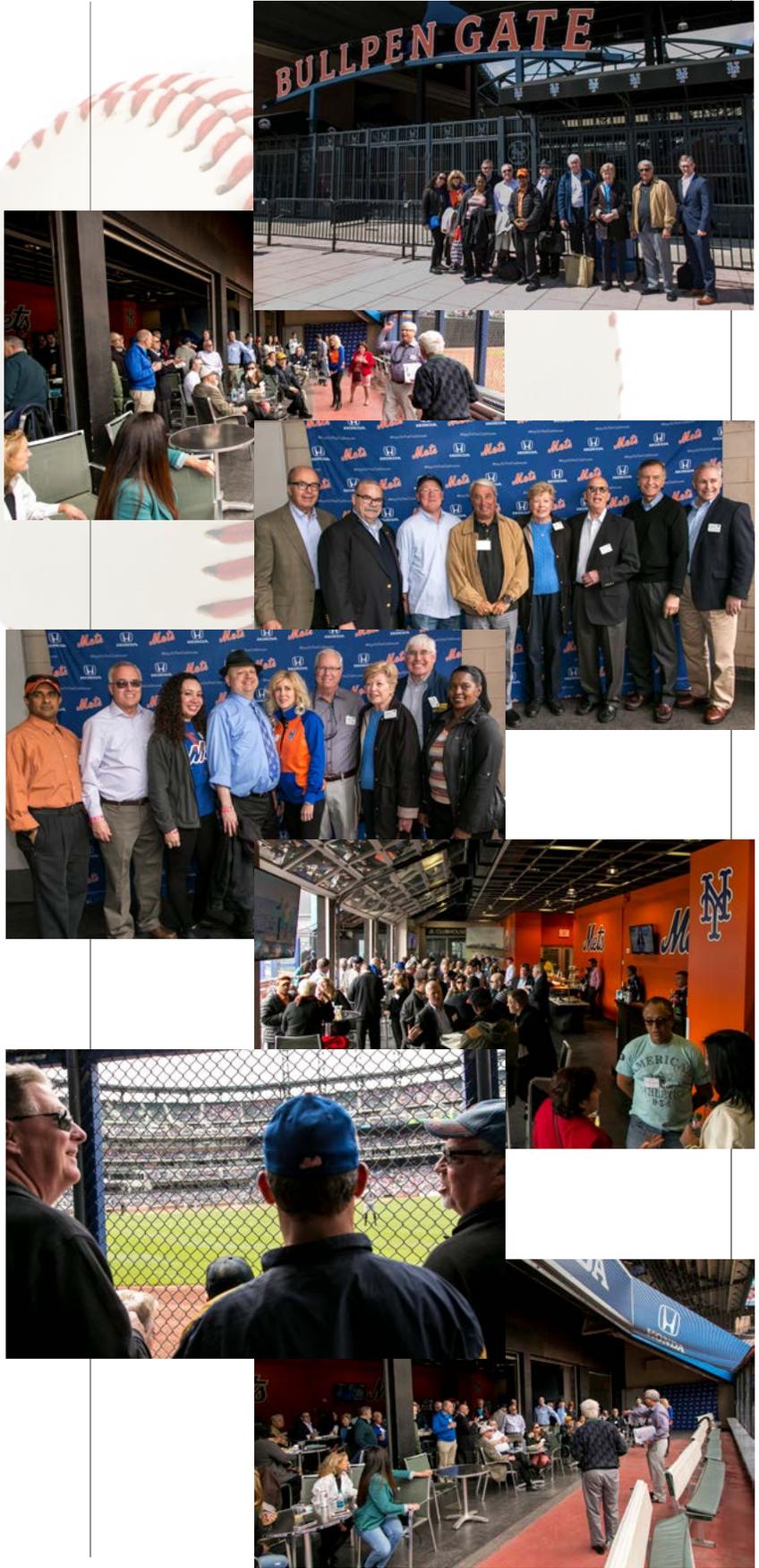
Even though the Mets lost, attendees had a fun afternoon at the ballpark, feasted on plenty of ballpark food and drinks and enjoyed a great networking event with friends and industry colleagues. Attendees liked the experience so much that ELANY is planning on doing a similar event for next year's Annual Members' Meeting – maybe at Yankee Stadium.

Albany Legislative Reception

ELANY's 2017 Legislative Reception was held at the Fort Orange Club, steps from the Capital in Albany on May 15, 2017. The reception allows ELANY Board members and senior staff to personally express to legislators and their key staffers the critical need for our unique marketplace. ELANY wants to sincerely thank the following legislators who attended this year's Reception and for their continued support of ELANY sponsored legislation: Assembly Insurance Committee Chair Kevin Cahill, Assemblyman William Barclay, Assemblyman Ken Blankenbush, Assemblyman Andrew Garbarino, Senate Insurance Committee Chair Jim Seward, Senator Phil Boyle, Senator Neil Breslin, Senator Martin Golden, Senator Chris Jacobs and Senate Majority Leader John Flanagan.

Meeting with the Department of Financial Services (DFS) Superintendent Vullo

On April 4, 2017, ELANY Staff and Board members met with DFS Superintendent Maria T. Vullo and Executive Deputy Superintendent Scott Fischer of the Insurance Division. At the meeting ELANY presented an overall view of the New York excess line market, emphasizing the fact that excess lines is a supplemental market. ELANY provided statistical information that showed the type of risks in the excess line market. ELANY also described its role and function in the marketplace and discussed the market financial security review of New York eligible excess line insurers provided by ELANY. DFS and ELANY agreed to maintain a continuing dialogue regarding excess line insurance market issues.



Cybersecurity Awareness Training

Offered at ELANY's Expense to All Active Members

New York DFS Regulation (23 NYCRR 500) requires every "covered entity," including New York licensed insurance producers, to assess their specific cybersecurity profile and design a program that addresses those risks, as well as, conduct periodic reviews and updates of their cybersecurity program in order to ensure the security of their information systems and protection of their clients "nonpublic information."

One of the requirements of the regulation is that "covered entities" must provide regular cybersecurity awareness training for all personnel. Studies and articles on cybersecurity note that one of the significant areas



of cybersecurity vulnerability involves employees who inadvertently open phishing emails, or otherwise through the use of social media inadvertently download viruses, malware or ransomware into an employer's computer systems. Addressing this area of system vulnerability requires effective training.

ELANY has negotiated with and retained a firm called "Knowbe4" that provides such cybersecurity awareness training and is offering this training to any active member, who chooses to accept this **ELANY funded benefit**.

For offer details and limitations please see ELANY Bulletin No. 2017-14 dated May 31, 2017 and Bulletin No. 2017-16 dated June 12, 2017.

At left is a chart of compliance dates/deadlines contained in the Regulation.

Requirement for Covered Entities (Not Exempted by the Regulation)	Compliance Deadline
Develop cybersecurity program and policy	8/28/17
Designate Chief Information Security Officer (CISO)	8/28/17
Limit user access privileges to certain information systems	8/28/17
Have cybersecurity personnel in place	8/28/17
Establish written incident response plan	8/28/17
Begin notifications to DFS of any cybersecurity event	8/28/17
Submit initial notice of exemption filings to DFS for entities that determine they qualify	9/27/17
Provide compliance certification to DFS	2/15/18
Deliver CISO report to the firm's board on the firm's cybersecurity program	3/1/18
Perform penetration testing and monitoring assessments	3/1/18
Conduct a risk assessment of the firm's information systems	3/1/18
Institute multi-factor authentication	3/1/18
Provide cybersecurity awareness training for all personnel	3/1/18
Ensure systems provide an audit trail	9/3/18
Meet record retention requirements	9/3/18
Create guidelines for the security testing of applications and the development of applications developed in-house	9/3/18
Institute data retention limits	9/3/18
Initiate procedures to monitor the activity of authorized users and detect unauthorized access of systems	9/3/18
Establish controls for nonpublic information using techniques such as encryption	9/3/18
Launch third party service provider security policy	3/1/19

Commercial Crime Coverage Exclusions

(NY Insurance Regulation 209)

Effective July 1, 2017, NY Insurance Regulation 209 (11 NYCRR 76) prohibits insurance companies from excluding coverage for employees with criminal records employed by New York businesses under a commercial crime insurance policy. The regulation is intended to make it easier for businesses to hire formerly incarcerated individuals upon reentry and help them obtain necessary coverage for any loss or damage caused by an employee with a criminal record. The regulation ensures that employers will be able to obtain this coverage, provided that they considered a set of factors outlined in New York State Correction Law (Article 23-A) governing the hiring of people with criminal convictions.

The Regulation appears to apply to policies written by excess line insurers since Section 76.2 states in pertinent part that, "No policy issued, renewed or **delivered in this state** that provides commercial crime insurance coverage may exclude or limit coverage for loss or damage caused by an employee ..." (**emphasis added**). Excess line policies are "delivered in this state."

DFS Proposed Regulation

May Potentially Ban Education/ Occupation for Private Passenger Automobile Insurance Underwriting and Rating Purposes

The New York Department of Financial Services (DFS) proposed regulation (**2nd Amendment to Regulation 150 – Private Passenger Motor Vehicle Insurance Multi-Tier Programs**) that would potentially prohibit private passenger automobile insurers from the practice of using an individual's educational level or occupational status as factors in either initial tier placement or tier movement, unless the insurer demonstrates to the DFS Superintendent's satisfaction that the use of these factors does not result in rates that are unfairly discriminatory.

The proposed regulation, which is subject to a 45-day notice and public comment period following the May 17, 2017 publication in the New York State register, provides 180 days for insurers that had been using education level and occupational status in initial tier placement and tier movement to amend their multi-tier rating programs and tier movement.



NEW YORK STATE
DEPARTMENT of
FINANCIAL SERVICES

Regulatory Actions against Brokers

Impermissible Group Policies

The New York Department of Financial Services (DFS) recently fined an excess line broker \$50,000 regarding an "impermissible group" property insurance policy program, since the property insurance policy in question covered many unaffiliated insureds.

The DFS has strictly applied a ban on master policies or groups of unaffiliated insureds. The ban has generally applied to property and casualty insurance. The DFS calls these "impermissible groups" unless the group fits into an exception to the ban expressed in a statute such as "risk purchasing groups" or "employee sponsored group excess insurance."

The main objections to group coverage expressed by the DFS relate to:

1. "Aggregate limits" whereby one insured's claim can exhaust coverage for other unrelated insureds. (Insureds should have separate, independent limits.)

2. Legal notice requirements to individual insureds in the event of policy cancellation, termination or expiration may not be clearly stated. If this involves a nonpayment of premium by the group, a sponsor or employer, the individual insured may not know coverage was terminated.
3. Benefit denials to an innocent insured due to conduct or misrepresentations by another insured, group sponsor or employer may occur.

W.R. Berkley Corp. & Affiliates Fined \$12 million by California Insurance Department

The California Insurance Department recently fined W.R. Berkley Corp. and affiliated entities Admiral Insurance Company, Admiral Risk Insurance Services and other related entities \$12 million for surplus line broker licensing violations and unlawfully transacting surplus lines insurance in California. This is one of the largest penalties for licensing violations ever assessed by the California Insurance Department

A Department investigation found that Admiral Risk Insurance Services and its employees transacted surplus lines insurance business without holding requisite surplus line broker licenses for the period of November 2003 through June 2011. Additionally, Admiral Risk Insurance Services impermissibly acted as a managing general agent for affiliated company Admiral Insurance Company, an insurer not admitted to transact business in California.

California does not permit licensed surplus lines insurance brokers located in California from acting as a managing general agent for an affiliated non-admitted insurer on risks originating or located in California. New York law is different in this regard. An eligible excess line insurer can share New York office space with an affiliated New York licensed insurer and operate from that New York office. New York also permits this kind of transaction when you are acting as a cover holder, managing general underwriter, or program administrator from a New York office, pursuant to a binding authority agreement entered into with an eligible excess line insurer as long as you are properly **licensed as an excess line broker and have filed the binding authority agreement with ELANY.**

ELANY Sponsored Legislation

ELANY was successful in having two bills reintroduced in both houses of the legislature for the 2017 session.

Medical Malpractice Insurance Reform Legislation (S422/A29)

The purpose of the Bill is to repeal the requirement that excess line brokers must obtain a declination from the Medical Malpractice Insurance

Pool (MMIP) before the broker can place primary malpractice insurance for physicians, dentists and general hospitals in the excess line market.

Repealing the MMIP declination requirement will provide doctors, dentists and general hospitals a broader array of choices, products, terms and conditions to suit a professional's particular insurance needs, and also benefit consumers who need protection and support should an unfortunate medical event occur. While all insurers, including MMIP, will be permitted to continue to make available their malpractice insurance products, the addition of excess line insurers will allow medical professionals greater choice in the selection of insurance policies which best suit their needs from a number of additional, highly rated insurers.

Punitive Damage Insurance Reform Legislation (S423/A4734)

The purpose of the Bill is to permit insurers to offer punitive damage insurance to New York insureds. The legislation is permissive in that insurers may offer the coverage but are not required to, and buyers may purchase the coverage but are not required to.

New York is one of only two states that completely bars insurance for any punitive damages assessed. The vast majority of states permit insurers to provide coverage for punitive, exemplary damages and civil penalties.

This coverage most often comes into play for professional lines coverage and cyber liability. D&O coverage often insures liability for statutory violations, such as Title VII discrimination. Title VII provides for the award of punitive damages in a case such as where an employee intentionally discriminates for which the company is held vicariously liable.

Any concern that coverage for punitive damages will result in insurance for intentional or criminal acts can be addressed in the same way policy exclusions are written in the states that permit coverage for punitive damages. In the states that permit the insurance of punitive damages, insurance policies are written to exclude coverage for intentional acts of the named insured.

The current approaches, such as buying punitive damage wraps or using most favored nation language in the insurance policies, leave brokers exposed to unpredictable holdings by New York courts. Permitting brokers to obtain the broadest coverage possible in one policy allows a broker to meet an insureds needs clearly and without doubt in the outcome.

The result of any large punitive damage judgment awarded in New York today is often an uncollected, hollow judgment without benefit to the aggrieved party and without punishment to a judgment debtor, who files bankruptcy or otherwise ceases to do business without satisfying the punitive damage award. This Bill seeks to foster the collection of court awarded damages by the plaintiffs in the rare instances when such damages are awarded.

CALENDAR

2017	
July	
Wednesday–Saturday July 12–July 15	The National Conference of Insurance Legislators (NCOIL) Summer Meeting InterContinental Chicago Magnificent Mile Chicago, Illinois
August	
Sunday–Wednesday August 6–August 9	National Association of Insurance Commissioners (NAIC) Summer Meeting Philadelphia Marriott and Pennsylvania Convention Center Philadelphia, Pennsylvania
September	
Sunday–Wednesday September 10–September 13	National Association of Professional Surplus Lines Offices (NAPSLO) Annual Convention Manchester Grand Hyatt San Diego San Diego, California
October	
Thursday October 26	Professional Insurance Agents of New York (PIANY) Hudson Valley Rap Ramada Conference Center Fishkill, New York
Thursday October 26	Insurance Brokers' Association of the State of New York (IBANY) Fall Reception Tribeca Rooftop New York City, New York
November	
Thursday–Sunday November 16–November 19	The National Conference of Insurance Legislators (NCOIL) Annual Meeting Sheraton Phoenix Downtown Phoenix, Arizona
December	
Saturday–Tuesday December 2–December 5	National Association of Insurance Commissioners (NAIC) Fall Meeting Hilton Hawaiian Village and Hawaii Convention Center Honolulu, Hawaii
Wednesday December 13	Insurance Industry Charitable Foundation (IICF) Northeast Division Annual Benefit Dinner New York Times Square Sheraton New York, New York



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