

# The E&S Empire Express



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## ELANY SUNSET EXTENDER (S8385/A11428)

ELANY is pleased to announce that legislation, sponsored by Senator Jim Seward and Assemblyman Joe Morelle to extend ELANY's authority for five more years, was passed by each house of the legislature during the week of June 22. The extender legislation, which was transmitted to Governor Paterson for signature and signed on June 30, 2008, moves ELANY's sunset date to July 1, 2014. The Board of Directors and staff of ELANY are pleased with the support shown by the Insurance Committee Chairmen, in both houses of the legislature, for proactively pursuing this legislation and have expressed their collective and sincere gratitude for the opportunity to continue to serve New York.

## ELECTRONIC FILING

In February 2008, ELANY's fully electronic filing platform was rolled out for testing among a number of broker-member volunteers. The testers made comments and recommendations to ELANY's IT Department to improve and enhance the system. A number of adjustments were made to the system, while simultaneously the IT and Help Desk staff trained one member after another on the use of the system.

In four short months, the results have been tremendous. By the month of June, 150 broker members were trained and actually utilizing the fully electronic filing system. Five thousand three hundred forty three (5,343) affidavits, representing 42.90%, were created and submitted for electronic signature and transmission in June out of a total of 12,455 affidavits submitted. An additional 1,662 affidavits were created using ELANY's system but were submitted by regular mail. A total of 56.24% of all affidavits submitted in June were created using the ELANY system.

ELANY's help desk continues to meticulously train broker staff members and answer broker questions as additional brokers commit to using the fully electronic web interface system.

ELANY is also now beginning its efforts to create programmatic filing, whereby the broker's agency management system collects the necessary fields of information, electronically signs an affidavit and transmits the transaction data to the ELANY system. While programmatic filing will be geared towards high volume filers with sophisticated or packaged agency management systems, the two types of electronic filing will offer choice and an opportunity for brokers of all sizes to file electronically.

To sign up for electronic filing please call ELANY's helpdesk at 646-805-1200 or contact us by email at [helpdesk@elany.org](mailto:helpdesk@elany.org).

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## EXPORT LIST HEARINGS

On Friday, June 13, 2008, the New York State Insurance Department held public hearings to consider the collective request of the New York producer community to expand New York's current export list. The industry turned out in force to testify in support of adding a number of types of coverage to the export list, including liability for construction contractors, homeowners in the counties of Long Island, miscellaneous professional liability, high excess liability and umbrella coverage and similar high excess and jumbo property risks, among other classes of coverage.

All of the producer organizations in New York supported this effort, as well as NAPSLO and AAMGA on the national level. Oral testimony was provided by the following witnesses:

<b>Witness</b>	<b>Affiliated Organization</b>
Gary D. Ricker, Jr. President	PiWA
Timothy D. Dodge Director of Research and External Communications	IIABNY
Neal Sullivan Chairman	IIABA
Sharon Emek Managing Director	CBS Coverage Group
Dan Corbin Director of Research	PIA
JoEllen Flatt Operations Manager	Colemont Insurance Brokers
Daniel Maher Executive Director	Excess Line Association of New York
Kurt Bingeman President	Russell Bond & Co., Inc.
Steve Paris General Counsel	Lexington Insurance Company
Betsy McCoy Senior Vice President	Lexington Insurance Company
Steve Stephan Director of Government Relations	NAPSLO
Gary Hollederer Executive Vice President	Russell Bond & Co., Inc.
Richard Marx President of PCM Services	IBANY
Janet Pane Chief Operations Officer	Willis of New York
Robert Farella Vice President	Swett & Crawford

The testimony explained in great detail why the unique appetites of licensed insurers for certain types of risks and aversion to others push those risks to the wholesale market and to excess line carriers. Moreover, a substantial amount of testimony reflected upon the substantial business and economic reasons which make licensed insurers the first priority for transacting whenever licensed insurers are available to write such risks.

The hearing officers were:

### Officers

Robert Easton  
Deputy Superintendent and General Counsel

Michael Moriarty  
Deputy Superintendent of Property and Capital Markets Bureaus

Larry Levine  
Chief Examiner of the Property Bureau

Maurice Morgenstern  
Deputy Chief Examiner of the Property Bureau

Nancy Yee  
Principal Examiner Excess Line Unit Property Bureau

While no Department decision had been made at the time this newsletter went to press, the hearing officers' comments toward the end of the hearing left the audience cautiously optimistic that real progress had been made.

## INSURANCE ACTIVITIES ON CAPITOL HILL

The McCarren Ferguson Act, which delegates to the states authority to regulate the insurance industry, is still alive and well, though you would not think so when you turn your eyes towards Washington. Over 80 bills this session have been introduced in Congress, which would directly impact insurance. For the sake of our readers, we will not review each one but only those most pertinent to producers and the excess line community.

First, a prediction. The only legislation, which has any real chance of passing both Houses in 2008, is an extension of the National Flood Insurance Program (HR3121/S2284). The House Subcommittee on Capital Markets and Insurance will hold hearings on legislation introduced by its Chairman, Paul Kanjorski, to create a federal Office of Insurance Information within the Treasury Department. The bill, the Insurance Information Act of 2008 (HR5840), provides for certain pre-emptions of state insurance laws and may be the precursor to passing Optional Federal Charter legislation. Those hearings were scheduled for July 9, 2008 and tentatively July 15, 2008 for the full House Financial Services Committee. While this proposal is unlikely to go anywhere in 2008 because no Senate companion legislation has been introduced, it is interesting to note that the NAIC has made public comment that it

could support this legislation with modifications. On the other hand, the National Conference of Insurance Legislators (NCOIL), is vehemently opposed to Federal proposals, which will preempt state insurance laws or regulation. While the members of the NAIC all receive their authority from state legislators, the NAIC itself is pursuing an increased level of activity on Capitol Hill. This may be a recognition by the NAIC that Congress will ultimately be more involved in the insurance industry; or it could simply be that the NAIC sees Congress as the entity, which can provide them with a level of governmental authority beyond its traditional role as a trade association.

The Nonadmitted and Reinsurance Reform Act (HR1065/S929) passed the full House once again this year. The Senate has not taken this bill up in committee as of yet, though the bill's proponents have urged the Senate to do so. It is likely the Senate Banking Committee will hold broad hearings on insurance modernization issues but it is not likely to hold specific hearings on this bill. Without hearings on this bill and a mark up by the Committee, the legislation will not be reported to the full Senate. The NAIC has again, weighed on this bill at the request of Congressional staffers. While the NAIC did not make its comments available to the general public, the comments essentially supported the nonadmitted portion of the bill if several provisions could be rewritten but also recommended the reinsurance portion of the bill be dropped.

*For a more thorough analysis of this bill, please see ELANY's March 2007 newsletter.*

The National Insurance Act (HR3200/S40) would create authority to have insurance companies obtain a national license (OPTIONAL FEDERAL CHARTER), which would be subject to a separate and new regulatory framework created by the federal government.

While a complete analysis of this 300+ page bill is beyond the scope of this newsletter, ELANY has taken a position in opposition to this bill for the following reasons among others.

1. A new federal bureaucracy will be created, the costs of which will be born by insurance consumers.
2. While the intent is to regulate the federally chartered insurers separately, a complete segmentation from state law will be impossible, so this bill adds another regulator not an alternative regulator.
3. Many states require minimum policy terms and conditions; however, they will not apply to policies issued by federally char-

tered insurers making it very difficult for brokers to offer policy-to-policy comparisons.

4. A separate system of consumer protection is intended for policies issued by federally chartered insurers. Thus, in a dispute which pits coverage denials by both a federally chartered insurer and a state chartered insurer, under a separate but related policy, no single consumer service bureau will have jurisdiction to resolve the issue.
5. The bill, unlike every state insurance law, has no minimum capitalization requirements to obtain a federal charter.
6. The creation of a system where a choice of alternative regulators exist, will lead to the sale of insurance products based upon the path of least resistance. In the world of banking, where such a system exists today, many states repealed or waived a prohibition against "mortgage prepayment penalties" because state banks had such restrictions and federal banks did not. State banks insisted on parity in lieu of converting to federally chartered banks.

The National Association of Registered Agents and Brokers Reform Act of 2008, NARAB II (HR5611) was introduced in the House this session. As part of the Gramm Leach Bliley Act passed in 1999, states were given three years to enact uniform or reciprocal licensing for insurance producers. If 29 states and territories failed to accomplish this, state producer licensing laws were to be preempted and a new licensing system under the auspices of the NAIC was to be created known as the "National Association of Registered Agents and Brokers". Since more than 29 jurisdictions were certified as reciprocal by the three-year deadline, NARAB was not activated.

Now almost ten years later, the producer community has re-approached Congress noting that reciprocal licensing does not mean uniform, simple or easy licensing because state laws still vary tremendously.

Fingerprinting, bond requirements, continuing education mandates, seasoning and prelicense testing issues, secretary of state filings, individual vs corporate licensing variations all contribute to a complicated, fractious system. In response to the need for an easier producer licensing system, a new design to NARAB has been drafted and is contained in the referenced legislation. The essential elements of NARAB II are:

1. First and foremost, the Act expressly applies to surplus line brokers. This bill picks up where the Gramm, Leach, Bliley Act left off and formally creates an association as a not for profit corporation under the District of Columbia's Non-Profit Corporation Act.



2. Any producer licensed in its Home State is eligible to become a member of the association provided the producer has not had a license suspension or revocation for the past three (3) years. The intent of the Act is to streamline non-resident licensing, license qualifications and continuing education requirements but preserving license enforcement issues to the states. All producers seeking membership must submit to a criminal background check. The Association can establish criteria for membership reasonably related to the purposes for which the Association was established including refusal to grant membership based on adverse information developed in the criminal background check.
3. Membership in the Association will permit a producer to sell, solicit and negotiate insurance in any state to the extent the producer is permitted to so do in its Home State.
4. Only the Home State of the producer can deny a member a license for which a fee is paid. Also, only the Home State can mandate a business entity license be obtained to engage in the sale, solicitation and negotiation of insurance. Non-resident states cannot mandate duplicative licenses in order for employers to compensate individuals, such as employees, or for the employers to receive commissions.
5. The Association will act as each member's agent with regard to paying non-resident licensing fees.
6. NARAB will establish its own continuing education requirements for states other than the Home State.
7. An office of Consumer Complaints will be established.
8. A nine-member board will be established with four insurance commissioners and five industry representatives. The NAIC will select three insurance commissioners, who will select the fourth insurance commissioner.
9. The industry representatives will be selected one each by the IIABA, CIAB and NAIFA and one jointly by the AIA, PCI and NAMIC and the last jointly by ACLI and AHIP.
10. The legislation authorizes the board to establish fees for services and to undertake all actions typically permitted of a corporation.
11. The bill imposes preemptions on state laws which would impede or be designed to impede the ability of a non-resident producer from placing risks or procuring insurance as a non-resident producer.
12. The Association is permitted to establish or utilize a clearinghouse through which members may apply for issuance or renewal of multiple licenses.



## NEW YORK LEGISLATURE MOVES INSURANCE LEGISLATION IN '08

The New York State Legislature had a busy '08 Insurance agenda above and beyond the passage of ELANY's extender. Some bills made it through both houses and will go to the Governor. Others did not make the cut in at least one house of the legislature. The bills, which could most impact the E&S community, are as follows:

### LATE NOTICE OF CLAIM (S8610/A11541)

This legislation is intended to conform New York law to that of all other states by requiring evidence that an insurer was prejudiced by a late notice of claim before the insurer can disclaim coverage. Current New York law generally allows an insurer to deny coverage for a late notice of claim regardless of whether the insurer's ability to investigate, settle or litigate the claim was affected at all by the late notice.

This bill also provides that:

1. An insurer cannot disclaim coverage for late notice unless it can show its ability to investigate or defend the claim was materially prejudiced by the late notice.
2. If notice was late, but within two years of the notice requirement set forth in the policy, the insurer has the burden of proof to show prejudice.
3. Notices, more than two years late, shift the burden to the insured to prove no material prejudice resulted to the insurer.
4. Claimants are granted a specific right to bring a declaratory judgment action on the sole question of late notice prior to the claimant obtaining a judgment against the insured, if neither the insured nor insurer bring such an action against each other within 60 days of a disclaimer of coverage by the insurer.
5. The claimant is also granted the right to demand coverage information from the insurer before bringing a suit against the would-be insurer under certain circumstances.

The legislation passed both houses and is expected to be signed by the Governor.

**NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION, EXPANSION, PERMANENCY AND FLEX RATING BILL (S8624/A11693)**

The referenced legislation, which became known as the “Coastal” bill, passed both houses and has already been signed by Governor Paterson.

As to coastal issues, the bill will:

1. Make NYPIUA permanent,
2. Expand the perils which can be insured by NYPIUA policies,
3. Expand the type of NYPIUA coverage to be issued in conjunction with a wrap around policy issued by a voluntary insurer [for instance to include replacement cost coverage],
4. Reconstitutes the Coastal Market Assistance Program and an C-MAP Agents Advisory Council,
5. Mandates reporting by the Superintendent to the Legislature after conducting studies of the impact,
  - a. A major weather catastrophe could have on the state, and
  - b. An evaluation of existing state and local building codes and feasibility of new practices such as retrofitting.
6. The bill also creates flex rating for private passenger auto insurance within a 5% band in any single year.

**GROUP IDENTITY THEFT AND GROUP PROPERTY TRAVEL INSURANCE (S7561/A10403)**

The referenced legislation was passed by both the Senate and the Assembly and will create two new types of insurance products for sale in New York. While ELANY strongly supports efforts to authorize the sale of new types of insurance in the State of New York, this legislation was not all that it could have been. It explicitly provides that only authorized (licensed) insurers can sell these products, which means excess line insurers cannot sell the product even if an insured wants to buy it, but cannot find a licensed insurer to sell it. The legislation also contains extensive and strict provisions regarding cancellation and non-renewal terms. Had these provisions been left to the discretion of the Superintendent to adopt by regulation, no doubt they could have been more malleable.

The proponents of this legislation had worked on it for several years, and any input by ELANY or other excess line interested parties may have killed the bill instead of simply correcting the shortcomings. There is always next session for clean ups!

A producer-licensing bill (S7369/A10404), which would have brought New York producer licensing law into line with NAIC standards, was passed by the Senate but died in the Assembly Codes Committee.

**COMPULSORY PUBLIC VESSEL LIABILITY INSURANCE (S8659/A11655)**

In 2006, a vessel named the Ethan Allen capsized in Lake George causing the accidental death of 20 senior citizens. This tragedy was compounded by the failure of the vessel owner to maintain protection and indemnity insurance (P&I insurance). This year, the legislature once again took up the issue of mandating the purchase of this insurance by public vessel owners. ELANY’s counsel made recommendations on the wording for this legislation to make sure vessel owners had access to excess line insurers for this coverage. Since excess line insurers are major writers of P&I insurance, excluding them from writing this coverage could have led to an unintended result essentially mandating a vessel owner buy insurance without giving them access to carriers which write this type of coverage. The bill was passed by the Senate but was not reported out of the Assembly Codes Committee.

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**MINNESOTA AUTHORIZES NEW STAMPING OFFICE**

It is ELANY’s pleasure to announce that the state of Minnesota passed legislation this session to authorize the creation of a new stamping office.

The stamping office legislation resulted from the hard work of several Minnesota State employees, most particularly Richard Turner and Patrick Finnegan of the Department of Revenue, as well as Manny Munson-Regala, a Deputy Commissioner in the Minnesota Department of Commerce.

ELANY was pleased to participate in a number of meetings where the formation of this new office was the goal. NAPSLO and the stamping offices from Illinois, Texas, California, Washington, Mississippi, Arizona and Oregon also provided support.

Congratulations to our colleagues in Minnesota for a job well done. ELANY will continue to offer support and assistance in any way that it can.





## PENDING AT THE INSURANCE DEPARTMENT

The New York State Insurance Department is pursuing reform and change on numerous fronts. Most relevant to the producer community and excess line markets are the following:

1. The Insurance Department will hold public hearings on July 14, 23 and 25 regarding producer compensation disclosure, contingent and other forms of compensation and whether a regulation should be promulgated to address these issues. (See *ELANY Bulletin No. 2008-16* for further details.)
2. The Insurance Department has drafted an amendment to Regulation 41 to increase the minimum capital and surplus an insurer must maintain to be an eligible excess line insurer in New York. The draft regulation amendment would phase in increases for insurers who are currently eligible and reach a \$45 million policyholder surplus requirement by December 31, 2010.
3. The Insurance Department has led a blue ribbon commission on medical malpractice reforms in New York. While that work is not yet complete, ELANY has requested that the Superintendent con-

## The New York State Insurance Department is pursuing reform and change on numerous fronts.

sider amending the Plan of Operation of the Medical Malpractice Insurance Pool (MMIP) to authorize it to decline to write coverage when a doctor, dentist or general hospital prefers coverage from an excess line insurer. The law currently requires excess line brokers to obtain a declination from MMIP for a doctor, dentist or general hospital primary risk in order to have conducted a proper diligent search. Since MMIP cannot currently issue a declination, these insureds are precluded from accessing excess line carriers for primary medical malpractice coverages.

4. The Superintendent leads a Financial Services Modernization Commission with day-to-day operations managed by its Executive Director, Scott Rothstein. The Commission has developed a number of subgroups to address insurance reform from ratings laws to holding company transactions and reinsurance. A recent meeting was held to discuss large commercial risks, the Free Trade Zone and the concept of the Exempt Commercial Purchaser. The question was asked whether the Free Trade Zone was properly utilized and if not why. The answer from participants related to both the Free Trade Zone as well as any definition of Exempt Commercial Purchases. New York has many mandatory policy terms and conditions set forth in statutes in some cases and regulations in other. The Free Trade Zone requires use of these specific and rigid terms and conditions. Most states, which define Exempt Commercial Purchasers, exempt these transactions from some of the otherwise mandatory policy provisions.
5. To maximize the benefit of the Free Trade Zone or an Exempt Commercial Purchaser provision, consideration ought to be given to allowing more flexibility regarding otherwise mandatory terms and conditions.