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COURT OF APPEALS

STATE OF NEW YORK

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EXCESS LINE ASSOCIATION OF NEW YORK  
(ELANY),

Appellant,

-against-

No. 98

WALDORF & ASSOCIATES,

Respondent.

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20 Eagle Street  
Albany, New York  
September 7, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The final matter on this  
2 afternoon's calendar is appeal number 98, Excess Line  
3 Association of New York v. Waldorf & Associates.

4 Counsel.

5 MR. HAMM: Thank you, Your Honor. May it please  
6 the court, my name is David Hamm. I'm with Herzfeld &  
7 Rubin, and I'm here on behalf of ELANY. I - - - I would  
8 start by noting that whatever may be said about Section  
9 2130 and 2118 that is the basis for capacity and standing  
10 in this matter, we are in the end an association. And we  
11 are seeking, by this suit, to enforce a lawful claim  
12 against our member.

13 CHIEF JUDGE DIFIORE: Counsel, what was the  
14 legislative purpose for creating the association?

15 MR. HAMM: Legislative purpose for creating the  
16 association?

17 CHIEF JUDGE DIFIORE: Um-hmm.

18 MR. HAMM: Was for the benefit of the insureds  
19 and the - - - to make sure that Excess Line Insurance would  
20 be available to provide insurance where no lawful - - - no  
21 admitted insurer could provide that insurance. And to  
22 funnel that information in so that it could be considered  
23 by the superintendent and also to be a buffer between the  
24 nonauthorized insurers, which were not under the  
25 supervision or the - - - or the rules or regulations of the

1 superintendent, and the Insurance Department.

2 JUDGE STEIN: It was, essentially, to protect the  
3 insureds, right?

4 MR. HAMM: Correct. However, if Your Honor is  
5 referring to the Uhr test or the Sheehy test or the for  
6 private cause of action, I was - - - I would first of all  
7 say that the issue of whether we meet that test, the first  
8 part of it, is not - - - is dependent on what statute we  
9 are looking at. We're not suing under Article 21 as a  
10 whole or even under 2130 or 2018 as a whole. We are suing  
11 particularly to obtain our stamping fees and to have the  
12 opportunity to take a look at the books and records of the  
13 Waldorfs. That's under Insurance Law 2118(c)(2) and  
14 2130(f). Those provision are directly for our benefit  
15 only.

16 JUDGE FEINMAN: Well, can - - - can the  
17 superintendent use its disciplinary authority to compel the  
18 Waldorf to enter into a settlement and make one of the  
19 conditions to pay you back the fees? Could the  
20 superintendent have done that?

21 MR. HAMM: Couldn't have done that. It didn't.  
22 There - - - there are three answers, really, to this.

23 JUDGE FEINMAN: All right. So it didn't do that,  
24 but I'm not asking whether they did that in this case.

25 MR. HAMM: Right.

1 JUDGE FEINMAN: I'm asking you whether they  
2 could.

3 MR. HAMM: Well - - -

4 JUDGE FEINMAN: And you're seeming to say yes.

5 MR. HAMM: I don't know. And I will - - - I  
6 don't know. I would posit. One answer is they didn't.  
7 Second answer is I don't know, and as part of a settlement  
8 that's possible. But I don't know, frankly, if the - - -  
9 if the superintendent has standing to seek recovery of the  
10 stamping fees that go to us.

11 JUDGE STEIN: But doesn't their approved plan of  
12 operation require you to let DFS know when the stamping  
13 fees aren't paid?

14 MR. HAMM: Absolutely.

15 JUDGE STEIN: And what would be the point of that  
16 if DFS couldn't do anything about it?

17 MR. HAMM: Disciplinary action. They could  
18 certainly bring a disciplinary action against the - - - the  
19 brokers, could eliminate their license, could cancel their  
20 license for failing to comply - - -

21 JUDGE STEIN: But where does it -

22 MR. HAMM: - - - with the Insurance Law.

23 JUDGE STEIN: If they could do that why couldn't  
24 they sue?

25 MR. HAMM: Could they have? I don't know because

1 I'm - - - I'm not saying definitely that they can. But  
2 when it comes to - - - to the question of standing, the  
3 question is what is their stake in the outcome. Right.  
4 That's - - - that's what the courts have said. What stake  
5 does the superintendent have in going out and seeking  
6 recovery of our stamping fees? That's our money. That's  
7 not the insurance department's money. It's not the State's  
8 money. It's not the - - - any insurer's money. It's not  
9 any insurance money. It's our money alone.

10 JUDGE WILSON: So you're saying you have standard  
11 because you have injury in fact because there are fees that  
12 are due to you that you haven't received?

13 MR. HAMM: That's correct. That's certainly  
14 correct. But - - - but beyond that - - - and I'm not - - -

15 JUDGE WILSON: And you have capacity to sue  
16 because you're a general business association and under  
17 Section 12 you have capacity. Is that what you're saying?

18 MR. HAMM: I'm sorry?

19 JUDGE WILSON: You have - - -

20 MR. HAMM: We certainly - - - yeah. I would - -  
21 - I was just going to say that at the beginning.

22 JUDGE WILSON: Standing and capacity are  
23 different.

24 MR. HAMM: Right.

25 JUDGE WILSON: I just asked you about standing.

1 MR. HAMM: Right.

2 JUDGE WILSON: I'm asking you now about capacity.

3 MR. HAMM: Yes.

4 JUDGE WILSON: You claim capacity is under  
5 Section 12 of the General Association Law; is that right?

6 MR. HAMM: That is correct. But we also say that  
7 we should have a standing - - - we should have capacity  
8 under 2130 and 2118 - - -

9 JUDGE WILSON: Okay.

10 MR. HAMM: - - - of the Insurance Law.

11 JUDGE WILSON: Okay.

12 MR. HAMM: And - - - and in that respect the real  
13 issue is, I think, whether the superintendent - - - whether  
14 it has standing or not - - -

15 JUDGE STEIN: But just before we leave the  
16 General Association Law, doesn't there have to be a right  
17 of action - - - doesn't a right of action have to exist  
18 first in order for there to be a lawful claim under Section  
19 12 of that?

20 MR. HAMM: I don't - - - I don't think there has  
21 to be a - - - I don't think there has to be an independent  
22 source of - - - of a cause of action. We have under the  
23 statute the right to obtain that money. The question, how  
24 do we go about it? Well, the General Association Law says  
25 that if have a lawful claim, which is the abil - - - the -

1 - - we have a claim for the money, we should be able to  
2 enforce it under the General Association Law. I think - -  
3 -

4 JUDGE STEIN: But also under that section,  
5 doesn't - - - doesn't the action have to be commenced by an  
6 officer - - -

7 MR. HAMM: That's it.

8 JUDGE STEIN: - - - of the association?

9 MR. HAMM: That's - - - that is correct, Your  
10 Honor. And that's true.

11 JUDGE STEIN: Okay. And it wasn't, right?

12 MR. HAMM: Except that we - - - it was not. But  
13 we - - - there have been cases which have stated that  
14 that's a correctable error. We asked the court below for  
15 leave to amend, and that's correctable error. That's  
16 something that can be - - - that can be done by amendment.  
17 And there's a case, Concerned Citizens against State, 140  
18 A.D.2d which - - - which says that that's something that we  
19 can take care of by amendment. So - - - and if that were  
20 the sole cause for dismissal, then we would have - - - we  
21 would start the action again under 205(a). We wouldn't  
22 have a problem with the statute of - - - I think - - - I  
23 think if that were the only issue, I think we could correct  
24 that.

25 The legislative purpose is promoted - - - the

1 second piece of Uhr - - - is promoted by allowing us to sue  
2 because the legislature wants ELANY to exist. Obviously,  
3 we've been doing a bang-up job. I've - - - that 2013 memo,  
4 I haven't seen praise like that for anything coming out of  
5 the legislature. And - - - and they want us to be there.  
6 We can't exist if we can't get our stamping fees. It's our  
7 sole source of money. We don't have - - - if we don't get  
8 the stamping fees, we're dead.

9 And is it consistency with the legislatively  
10 scheme? We are not interfering with any way with the  
11 Insurance Division. We - - - they go after the taxes.  
12 They go after the penalties. They impose discipline.  
13 We're not doing anything of the sort. What we are seeking  
14 is simply to get our stamping fees and the opportunity to  
15 look at the books so we can see how much we're owed. So I  
16 - - - I think we fit within the Uhr scheme even if we had  
17 to rely upon it for capacity and - - - for capacity.

18 JUDGE STEIN: Do you agree that - - - that your -  
19 - - that your capacity is advisory to CFS?

20 MR. HAMM: There are some aspects in which, yeah,  
21 we are - - - we do advise the superintendent. To be sure,  
22 we give a lot of advice to the superintendent. We - - - I  
23 say the superintendent. It's deputy superintendent. We do  
24 it - - - we do provide a lot of advice, but - - - and among  
25 them is the - - - the advice concerning those excess - - -

1 excess line carriers which should not - - - which should  
2 not be part of the scheme.

3 JUDGE FAHEY: You know, I don't see this as a  
4 question of your right to the stamping fees but more who  
5 has the enforcement power to collect the stamping fees, and  
6 that seems to be a little bit different question. And the  
7 statute seems to reserve all the enforcement power in DFS  
8 and the superintendent.

9 MR. HAMM: Really? 109(d) of the - - - of the  
10 Insurance Law provides that they may go after penalties,  
11 not - - - it doesn't say anything about our fees. It says  
12 - - - it talks about - - -

13 JUDGE FEINMAN: Can't - - - under 109, you know,  
14 bring a lawsuit and then remit the proceeds that they  
15 recover directly to your association?

16 MR. HAMM: Well, take a look at this now. What  
17 is the impetus for the superintendent to now seek - - -  
18 bringing - - - use the resources of the - - - of the  
19 Insurance Division, use their resources in order to go out  
20 and bring a lawsuit against the Waldorfs to recover fees  
21 which go directly to us?

22 JUDGE STEIN: Well, they couldn't do that here  
23 because they had the settlement but - - - but they may have  
24 made that choice.

25 MR. HAMM: Well, the settlement actually only

1           stated that they were settling the property taxes and  
2           disciplinary action. If you look at the wording, and  
3           that's what we look out for this when we try to interpret a  
4           document, the only thing that they stated that they were  
5           settling was the property taxes and the - - - and the  
6           disciplinary action. Nothing at all about the fees, zero.

7                   CHIEF JUDGE DIFIORE: Thank you, counsel.

8                   MR. HAMM: Thank you, Your Honor.

9                   CHIEF JUDGE DIFIORE: Counsel.

10                  MR. BROWN: May it please the court, Michael  
11           Brown for respondents. Before addressing the issue of  
12           capacity, I just would like to make an observation and that  
13           is ELANY says this is about our stamping fees. They want  
14           you to ignore the actual complaint in this case. The  
15           actual complaint in this case is - - - alleges fraud,  
16           alleges antitrust violations, alleges consumer harm. And  
17           in fact, the issues that appellant has asked this court to  
18           hear are only two, and that is capacity and standing.

19                  But in point of fact, Justice Emerson of the  
20           Supreme Court also dismissed each of these claims for  
21           failure to state a claim. And that is not appealed. The  
22           appellant has raised no issue about that. It's possible  
23           that they could argue, well, you know, we argued standing  
24           and standing for the Donelley Act, the Antitrust Act, but  
25           clearly they concede in their own brief they're not a

1 competitor of the Waldorfs. There's no standing for that.  
2 Nor is there standing under the Consumer Protection Act.  
3 So in point of fact the - - - the issues that the plaint -  
4 - - the appellant has raised here are not really before  
5 court which is - - -

6 JUDGE STEIN: So - - - but let's assume - - -  
7 let's assume they are.

8 MR. BROWN: Yes, Your Honor.

9 JUDGE STEIN: If - - - if they can't sue to  
10 enforce their stamping fees and DFS doesn't, refuses to - -  
11 - let's say everybody - - - there's a mass demonstration  
12 and - - - and none of their members wants to pay the  
13 stamping fees anymore and DFS says, ah, we're not going to  
14 - - - you know, it's not our concern, then - - -- then  
15 what?

16 MR. BROWN: They have a remedy. And that's the  
17 plan of operation. You go first to the superintendent.  
18 And remember, the - - - the legislature says in creating  
19 ELANY - - - and they say that, you know, ELANY is - - - in  
20 their statement, in their brief, we have - - - we have  
21 these enforcement powers but then they cite the legislative  
22 history. The legislative history says ELANY an advisory  
23 capacity. But let me answer your question directly. The  
24 way it works you follow the plan of operation as you're  
25 required to by the legislature. You go to the

1 superintendent. If the superintendent says, nah, not  
2 interested, you have an Article 78 against the  
3 superintendent, which they did before - - - which they did  
4 before in ELANY against Curiale.

5 So they have a remedy. They chose not to follow  
6 it, and they chose not to follow it for a very simple  
7 reason. What this case is really about is about ELANY's  
8 trying to get some jurisdiction to be a co-regulator.  
9 That's really what this case is about. And it's  
10 interesting, the appellant cites the - - - the Uhr case.  
11 And the Uhr case has a very interesting quote in it. And  
12 it says basically that, you know, sometimes, you know, in  
13 dealing with consistency two statutes are inconsistent.  
14 And they work not in harmony but in disharmony. And what  
15 you have is two drivers at the wheel, and that's what needs  
16 to be avoided here is having two drivers at the wheel.  
17 There is one - - -

18 JUDGE WILSON: Didn't DFS say, essentially they  
19 said - - - this is alleged to ELANY if you want - - - go  
20 ahead and do whatever you want to do?

21 MR. BROWN: No.

22 JUDGE WILSON: No?

23 MR. BROWN: ELANY has an affidavit that he met  
24 with three unnamed people at DFS. Don't know who they are.  
25 Don't know if it happened. That's never been - - - been -

1 - - that's never - - - we've never had the capacity to - -  
2 - to litigate that to examine that. DFS has certainly not  
3 put in any papers. DFS could very well have written  
4 something and say, you know, you - - - you have the  
5 authority. But what would have to happen, Your Honor,  
6 under the legislation 2013 says that we're creating ELANY  
7 under the supervision of the superintendent. And you're  
8 going to operate pursuant to a plan of operation approved  
9 by the superintendent. So then he creates his plan of  
10 operation, and nowhere in there do they say and by the way,  
11 we want the right to sue.

12 JUDGE STEIN: But I - - - in follow up to Judge  
13 Wilson's questions, what - - - what if the plan of  
14 operation - - - that could be amended, I assume, by - - -  
15 with DFS' consent. Couldn't DFS approve as part of that  
16 plan of operation their right to - - - to seek to recover -  
17 - -

18 MR. BROWN: They would have to amend the plan of  
19 operation - - -

20 JUDGE STEIN: Okay. Yeah.

21 MR. BROWN: - - - which they haven't done.

22 JUDGE STEIN: Okay. But they could do that?

23 MR. BROWN: Oh, they absolutely could do that.  
24 They could go out tomorrow and say to the superintendent we  
25 want to plan - - - amend the plan of operation so that we

1 can sue. And if the superintendent wished to do that then  
2 - - - then that would be perfectly appropriate. That  
3 would be pursuant to the legislative mandate, but that's  
4 not what we have before us. What we have before us is a  
5 plan of operation which says you report it to the  
6 superintendent. Now - - -

7 JUDGE WILSON: So let me ask you this. If - - -  
8 if ELANY were a voluntary association, would they have  
9 capacity to sue?

10 MR. BROWN: No. Because you have two conflicting  
11 statutes. You have 2130 and you have - - - and you have  
12 General Association. Let - - - let me answer your  
13 question, if I - - - if I may. Because they're not a  
14 voluntary - - - they're not a general association.

15 JUDGE WILSON: But answer my question. My  
16 question's if they were, right.

17 MR. BROWN: If they - - - if they were - - -

18 JUDGE WILSON: IF there was not - - - what I'm -  
19 - - what I'm asking, really, is is your argument that  
20 because of the existence of the statutory scheme they don't  
21 have - - -I mean these are - - - these are businesses,  
22 right? These are insurers who have gotten together. If  
23 they simply had gotten together in a voluntary way and  
24 there was no statute do you concede they would have  
25 capacity to sue via an appropriate officer?

1 MR. BROWN: If - - - if they were a voluntary  
2 association, yes, Your Honor. And - - -

3 JUDGE WILSON: Okay. And because they are not,  
4 they don't?

5 MR. BROWN: That's correct.

6 JUDGE WILSON: Okay.

7 MR. BROWN: And that - - - and also, Your Honor,  
8 in Community Board Seven this court addressed the General  
9 Association Law with regard to artificial entities just  
10 like ELANY. And it said and it defined what they were,  
11 voluntary associations. This is an involuntary  
12 association. It's created by the legislature and its  
13 membership is involuntary.

14 JUDGE WILSON: In Community Board Seven there was  
15 a sort of lengthy discussion of the legislative history  
16 that showed, I think, very clearly that the city considered  
17 and deliberately rejected the idea that Community Board  
18 Seven would have the ability to subpoena the type of  
19 documents they were trying to subpoena in that case, right?

20 MR. BROWN: Yes, Your Honor.

21 JUDGE WILSON: Is there a parallel legislative  
22 history here?

23 MR. BROWN: Well, there is, Your Honor. First,  
24 we start with the legislative history saying ELANY is a  
25 voluntary association. And the people - - - the class of

1 people to be benefitted, especially benefitted, by the  
2 creation of ELANY are two, insureds seeking insurance in  
3 New York and the State's financial interest, and that's  
4 what it states. And very interestingly, as I say, in  
5 Community Board Seven, just like in ELANY, that's an  
6 advisory association also.

7 But here there is much evidence that ELANY - - -  
8 that there is contrary legislative intention. You have  
9 one, the insurance law has many provisions. There's a  
10 chart at the end of the record, page 368, and it recites  
11 all the sections in the Insurance Law where the court says  
12 - - - where the legislature said and you can go to court  
13 and sue. And it has all the other things that ELANY has  
14 it, but it also says you got the right to use and they  
15 don't do that here. The legislature didn't do that here.  
16 The legislature has created a superintendent to be in  
17 charge of the Insurance Law. And as Uhr says, you don't  
18 want to have two drivers. You don't want to have competing  
19 interests.

20 A settlement just like this - - - and Your Honor  
21 asked a question before. What happens in the real world  
22 because the superintendent has those powers is the  
23 superintendent goes to a broker and says, look, we want you  
24 to make restitution to - - - to somebody. Doesn't say in  
25 the statute he can ask for restitution, but he says but if

1           you don't make restitution, I'll take your license away.  
2           Same thing here. The - - - the Department of Financial  
3           Services could come to the Waldorfs, to any other broker  
4           and say if you're not paying your fees, we're going to  
5           bring you up for violating the Insurance Law, and we'll  
6           take your license away. So pay your fees. And that's why  
7           the plan of operation approved by the superintendent did  
8           not give ELANY the independent right because the  
9           superintendent wants the right to make those settlements  
10          that he believes are in the interest of enforcement of the  
11          Insurance Law, not a second body. If you - - - if you had  
12          ELANY with that authority, Your Honors, these settlements  
13          would never happen because you'd have two coequal  
14          regulators and that's not what the legislative plan here  
15          is.

16                           CHIEF JUDGE DIFIORE: Thank you, counsel.

17                           MR. BROWN: Thank you, Your Honors.

18                           (Court is adjourned)

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