ART COLUMN FOR SEPTEMBER

A dangerous environment for ART

By Dick Goff

We who toil in the fields of self-insurance and ART find ourselves in a strange and dangerous environment. It's like walking through a minefield – during an earthquake – while trying to dodge a tornado.

Our enemies seem to have us surrounded, and these include that high-level trade group, the National Association of Insurance Commissioners (NAIC), the Obama administration fronted by its Treasury Department and IRS, and individual state insurance commissioners led by NAIC poster boy Dave Jones of California. Whew, it's no wonder we're so tired at the end of the day!

But in the meantime, we trudge on. Self-insured employee health plans continue to flourish and *Business Insurance* has marveled at the growth of ART in the great middle market.

Of course, the enemies cited above are largely the stalking horses for the traditional insurance industry whose mega-lobbyists troll the halls of Congress on the lookout for representatives who may lean in our direction – as well they should, given that self-insured ERISA plans are the most efficient and effective health plans available.

It's a shame, really, that a few state insurance commissioners can come so close to undoing a great form of risk management just because they're afraid of losing their turf. State insurance commissioners began jumping up and down in frustration when ERISA plans with federal preemption became available, and their heirs in those cushy jobs continue sniping at us to this day.

Insurance is still operating in a colonial American kind of way where each state sets the rules and each state insurance commissioner is a little king. Imagine if other industries had to operate under such a load: you'd have 50 different rules for information technology, automobile manufacturing (and California has even tried that, surprise!) and any number of other products.

Through their NAIC – which has no legislative or regulatory authority! – the insurance commissioners have worked for years on "model" rules that would hamstring

all aspects of the self-insurance industry, and now they're playing a full-court press against self-insured health plans by trying to raise the minimum stop-loss insurance attachment points beyond the affordability of smaller employers.

The California commissioner, Mr. Jones, has been accused of trying to stifle self-insured health plans among small businesses in order to drive more customers to his state insurance exchange that will be open for business in 2014. So, Obamacare strikes again!

The IRS is now considering a reversal of its position regarding its treatment of captive insurance of employer health plans, which could make it more difficult for captives to demonstrate sufficient risk distribution to qualify for tax characterization as insurance companies.

This issue will be fully addressed next month during SIIA's annual conference in Indianapolis by a panel of captive management and legal experts including Randall Beckie of Frontrunner Captive Management who wrote on this issue in the February *Self-Insurer*, and two distinguished attorneys specializing in self-insurance and captives, Thomas M. Jones of McDermott Will & Emory, LLP, and Charles J. Lavelle of Bingham Greenebaum Doll, LLP.

Another session at SIIA will bring together three state captive regulators: Michael Corbett of Tennessee, Steve Kinion of Delaware and Steve Matthews of Montana. It will be interesting to compare their approaches to learn if any common threads exist in captive regulation.

Regardless of how regulators and government try to push us around, captives and risk retention groups aren't going anywhere but up, in my opinion.

For example, if stop-loss attachment points are established at high levels, a captive structure can put a "collar" around self-insured plans that could look like a layer of stop-loss but not be stop-loss for regulatory purposes. Employers sponsoring employee benefit plans could access coverage defined as contractual liability insurance for the employer rather than the plan itself.

Such captives could be created in almost any structure: single-parent or group, with the option of segregated cells. These wouldn't even be visible to a state mandating high stop-loss attachment levels, and that insurance would still be used for excess of loss coverage.

So, you see, things aren't so bad for us. Now, just be careful as we walk through the minefield, and watch out for that funnel cloud.

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