ART COLUMN FOR OCTOBER

ART influencing NAIC from within

By Dick Goff

I could be wrong (don't laugh, it happened – once!) but it appears the ART world is becoming more effective at stating its case within the National Association of Insurance Commissioners (NAIC) process to regulate aspects of alternative risk transfer and self-insurance.

This doesn't mean we're winning the war, but at least we're on the same battlefield. The NAIC's working groups and task forces could still ram through so-called "model acts" for presumed adoption by states that would put self-insurance and ART at a considerable competitive disadvantage.

A point of clarification: this column will not dwell on the fact that the NAIC has no governmental authority. It is only a professional trade association comprised of state insurance regulators, but by the leverage of its accreditation process, it can force states to adopt certain standards of insurance regulation. We think this is unlawful, unconstitutional and generally despicable, but for the purpose of this column we will refrain from haranguing our readers on those points.

In recent weeks developments have indicated a heightened degree of pushback by the ART community. For the memorable past, NAIC's standards-setting process appeared to be biased against captives and self-insurance because of many state regulators' resistance to federal preemption by ERISA and the Liability Risk Retention Act.

A notable example: the NAIC's ERISA (B) Working Group – and please don't complain to me about mysteriously officious titles; I don't make them up – put off voting on a revision to the current stop-loss model act that would have raised attachment points on self-insured employee health plans from $20,000 to $60,000.

SIIA among other organizations raised objections to raising stop-loss attachment points as being detrimental to the employee benefit plans of small to mid-size employers, and a violation of ERISA federal preemption of state interference.

During floor discussion that was described as "spirited," several speakers voiced opposition to the increase. The working group concluded that members need more time to study the subject and would revisit the matter at the next meeting.

"That was encouraging," said Kevin Doherty, SIIA's representative to the NAIC. "It was clear there was substantial opposition to the change. But in reality only a relatively few states have adopted the existing model act, and to make a rule part of the accreditation standards requires a majority vote of all the states, which seems unlikely to me.

"However, one rumor that surfaced indicated the working group may vote on this matter during a subsequent phone conference, which I hope would not happen."

Kevin is the founding president of the revived Tennessee Captive Insurance Association and attorney with Nashville firm Burr & Forman LLP. "I sense that the captive domicile states are working together more effectively now within the NAIC structure, and that gives me some optimism about how captives and self-insurance will be treated." He also points out that Julie McPeak, Tennessee insurance commissioner with long experience with captives, now serves as chair of the NAIC's A Standards Committee, a highly prestigious position.

Within another NAIC group, the Risk Retention Group Task Force, the future fate of federally-sanctioned risk retention groups still largely hangs on an old argument on whether or not RRGs must adapt to statutory accounting for reports to their domiciliary state.

Kevin Doherty says the glacial deliberative process hasn't visibly accelerated, but that he believes the NAIC will continue to move toward regulating RRGs on the same standards as traditional insurance companies, which would limit their effectiveness in flexibility and multi-state reach.

Another observer, Larry Mirel, the former District of Columbia insurance commissioner now associated with Wiley Rein in DC, watched closely the proceedings of the NAIC's Captive and Special Purpose Vehicle Use Subgroup as it studied solvency requirements that would be stringent to captives.

Part of the deliberative process was an exchange of views between Joseph Torti, the Rhode Island insurance commissioner who chairs the subgroup's full E Committee,

and William White, the District of Columbia insurance commissioner, both of whom had been invited by the subgroup to speak to the issues. Aside from the expected opposing substance of their remarks, Mirel was drawn to their balance:

"The exchange of views showed they recognize the need for smart regulation to protect against real risks," Larry reported. "The NAIC should not propose regulations for the sake of regulating, but to support a robust insurance market while protecting consumers."

Mirel also observed that a good number of regulators and captive bureau managers from captive domiciliary states are now included in the NAIC standards-setting process, with hopes that the feared bulldozing of captive interests may not occur.

All of this points to the principle of changing a system by becoming part of that system. I'm still not a fan of the NAIC but I'm glad that some enlightened people are helping to influence its decisions.

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