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"Why Can't We Do That in This Country?"

D.C. Insurance Commissioner Lawrence Mirel talks about Congress, uniformity, and what state regulators can learn from the European Union

Lawrence H. Mirel was appointed Commissioner of Insurance and Securities Regulation for the District of Columbia in July 1999. Banking regulation was added to his responsibilities in March 2004, and he now heads the Department of Insurance, Securities and Banking (DISB). Since his appointment, Commissioner Mirel has focused on improving the speed and efficiency of regulation to better protect policyholders and to attract financial services activities to the District. The DISB has become a national leader in the use of technology in the regulatory process and now handles virtually all licensing and financial information electronically.

Commissioner Mirel plays an active role in the National Association of Insurance Commissioners (NAIC), where he is a strong advocate for harmonizing regulatory standards and promoting cooperation among state regulators to provide easier and less-expensive access to U.S. markets by national and international insurers. Mirel serves as chair of the NAIC/Industry Liaison Committee and of the International Regulatory Cooperation Working Group of the International Insurance Relations Committee. He also chairs the Class Action Litigation Working Group, which is studying the impact on regulatory authority of large class-action lawsuits, and serves on numerous other NAIC committees. He was recently named chairman of the board of the NAIC's System for Electronic Rates and Forms Filing (SERFF).

Lawrence Mirel, D.C. Commissioner of Insurance and Securities Regulation

Q. *A few years into heightened congressional interest in insurance, what's your assessment of where Congress is today on insurance regulatory reform?*

A. I think it's likely that sooner or later, this year or next or maybe the one after, Congress is going to do something in this area. I think there are two models out there, and I don't understand the politics of it well enough to know which one will come out on top.

One model is a model that saves state regulation but puts some federal preemption authority behind the effort to get uniformity. The other is a model that would set up a federal regulatory system—either taking over from the state regulatory system entirely, or some kind of a dual-track system like banking has. So I think those are the two models that are out there, and eventually one of them is probably going to get enacted into law.

Q. *In your opinion, does Congress want federal oversight of insurance, or would they rather leave it in the hands of the states?*

A. When you ask a question about what Congress wants, it's hard. Who are you talking about? My sense is that Congressmen Oxley and Baker do not want to see the creation of a federal regulatory system—that their desire is to improve the state-based system. But there was a Senate bill introduced a few years ago by Fritz Hollings that would in fact set up a federal regulator. So I know that both of them are out there. What I don't know is the way the votes line up. That's what I mean by not understanding the politics of it. I don't know if the position that Rep. Oxley is presenting is the predominant view in the House or not. And I don't know whether the other bill is the predominant view in the Senate. They

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IN THIS ISSUE

President's Column by Peter G. Gallanis

The Goals of Insurance Receivership

Reform of statutory provisions governing insurer receiverships is much in the news. As noted by Joni Forsythe elsewhere in this issue, a working group within the National Association of Insurance Commissioners (NAIC) has recently completed its first draft of the "Insurer Receivership Model Act" (IRMA). At the same time, staff to the Financial Services Committee in the U.S. House of Representatives has been holding meetings with interested parties regarding the Committee's State Modernization and Regulatory Transparency Act (SMART Act), a bill aimed at improving and standardizing various areas of state insurance regulation, including receiverships (which are the subject of Title XIII of SMART).

The Development of IRMA and SMART

The complete first draft of IRMA was distributed by NAIC staff late on April 29, 2005, after numerous significant revisions had been made to working drafts in March and April. IRMA has been slated for consideration and approval by the NAIC's Receivership and Insolvency Task Force at a conference call on May 13. Following approval by the task force, the draft would require approval by the parent Financial Condition (E) Committee and then in Executive and Plenary sessions of the full NAIC. IRMA has also been proposed as a new standard for state NAIC accreditation; proposed details of the accreditation requirements were circulated by NAIC staff on May 3 for discussion on the same May 13 teleconference.

SMART was circulated for comment unofficially by the Financial Services Committee in August 2004. Comments about various of SMART's Titles (17 in number, covering areas ranging from company licensing to receivership, and most other insurance topics in between) have been proffered since last August in various fora by interested observers, but reviewers' focus intensified in the spring of 2005 after the committee published a schedule for completion of the final version of SMART by June 2005.

The committee's schedule called for submission of written comments on Title XIII by April 20 and for review sessions with interested parties on April 25 and 26. Congressional staff appears intent upon completing a final draft of SMART in short order, though introduction and passage of the Act will depend on a variety of political factors, many of them having nothing to do with insurance receiverships (e.g., support for and opposition to premium rate deregulation).

Receivership Law Reform: The Big Picture

Though neither IRMA nor SMART's Title XIII is yet finished, both are moving rapidly toward completion. Either one, if made the "law of the land," would be at minimum the most significant statutory development in insurance receivership practice in decades. I will not offer detailed criticism of either proposal here, though comprehensive comments on both SMART and IRMA have been submitted with the support of NOLHGA's Legal Committee as those drafts have evolved, and final comments are forthcoming.

Instead, having participated to some extent (and not always willingly) in at least six comprehensive efforts to reset the template for American insurance receivership practice (the Dingell/Metzenbaum proposals, the last NAIC Model, IRLA/FIRLA, URL, SMART, and the NAIC's current IRMA project), I believe that the process of evaluating both SMART and IRMA is aided not only by minute review of their myriad details, but also by measuring the broad effect of those legislative proposals against a set of over-arching goals—"first principles," if you will, that should be served by a good receivership statute.

Guiding Principles in Receivership Law Reform

No one, to my knowledge, has yet published such a set of goals or first principles. Having been privileged to note over the years the comments of many experienced regulators, receivers, attorneys, consultants, judges, legislators, industry representatives, consumer spokesmen, and academics, I would like to offer for consideration the following list of receivership goals or guiding principles. I cannot claim that this list is exhaustive or even correct, and I know none of the concepts are original—I simply report them as I have heard others express them. I do, however, believe that, taken as a whole, these principles offer a very helpful "lens" for use in examining the structure and content of any proposal for reforming insurance receivership law.

Receivership and the "seamless web" of insurance regulation. Receiverships operate as the last stage in the life of an insurer, but that last stage is inextricably intertwined with earlier stages. Receivership rules must be an extension of the regulatory principles that applied to the company while it was healthy. Perhaps more important, financial regulation of a "live" company must be done with an eye to the effect of supervisory and regulatory measures should the company enter receivership. Examples of the latter point are regulatory valuation of "admitted assets" and rules about financial statement credit for reinsurance. There should be no "disconnect" between the realizable value of major assets in an insolvency estate and the value permitted to be claimed for such assets while the company was operating.

Similarly, the net amount recoverable on an insolvent company's reinsurance should bear an understandable relationship to the statutory credit allowed in respect of that reinsurance while the company was operating. Most important, regulation of a seriously troubled company must be conducted with a view to, and in preparation for, potential receivership—a point wisely recognized in the NAIC's recent White Paper on coordination and communication among regulators, receivers, and the guaranty system.

Decision making within the "zone of insolvency." Once an insurer has become sufficiently financially challenged that receivership is a significant possibility, the legal responsibility of company management (and the proper concern of regulators) should shift from protecting primarily the owners of the company to protecting the likely creditors in insolvency, and particularly the highest ranking class of creditors likely *not* to have their claims fully paid in an insolvency proceeding. In a typical receivership, that is likely to be the class of policy-level claimants. Devoting resources excessively to the protection of company stockholders, local employees and voters, or incumbent management of a seriously troubled company unjustifiably jeopardizes the interests of those with policy-level claims.

The fundamental purpose of a receivership. Receiverships exist to do a job that is, in theory, simple: to marshal the assets of the failed company, convert those assets to cash, and distribute the cash to those having valid claims against the company as directed by law. Put another way, the objective of a receivership is to sort out the relative rights and responsibilities of those who owe obligations to the insolvent company and those to whom the insolvent company owes obligations. We refer to those parties with ties to the failed company—whether creditors or debtors—as *stakeholders* in the receivership.

The role of the receiver. Although the law is surprisingly sparse on such a basic issue, this much seems clear: the receiver acts in a capacity like that of a trustee or fiduciary for all creditors of and claimants against the insolvent company. In so doing, the receiver must follow the statutory and decisional law applicable to the proceeding. Like any trustee, the receiver must adhere to a "prudent person" standard, and he or she should meet at least the normal commercial expectations of good faith and fair dealing regarding stakeholders who are not creditors.

As someone charged with responsibility for sorting out the relative rights and obligations of competing stakeholders in the name of the failed company, the receiver is *not* a stakeholder in the receivership, although he or she does bear responsibility for meeting the insolvent company's obligations and seeing that obligations owed the company are met, all as directed by law.

Transparency. A receivership is a judicial proceeding conducted under court supervision to sort out the rights and responsibilities of a failed insurer *vis-à-vis* its stakeholders. Although there is no legal or public policy need for general governmental "open meeting" provisions to apply to the conduct of a receivership, the same type of information access and data flow that exist in contemporary bankruptcy proceedings should also exist for the benefit of stakeholders in a receivership. Receivership stakeholders have rights similar to those of stakeholders in a bankruptcy, and today's technologies make it simple for a receiver to provide Web access to all important receivership documents and records and to provide e-mail notice of significant proceedings.

Moreover, through efforts of groups like the International Association of Insurance Receivers and others, standards for financial reporting in receiverships have advanced tremendously in the last 10 years, and there is no doubt that receivers can and should be furnishing stakeholders with meaningful, near-real-time financial and operational data on open receiverships. Obviously there is a need to keep relatively limited categories of sensitive information confidential, but in today's business and legal climates, transparency should be the rule, not the exception.

Openness and participation. Because receiverships take place for the principal purpose of sorting out the rights and obligations of stakeholders in a failed insurer, it follows that stakeholders should be able to know what is transpiring in the receivership that could affect them and to participate so as to be permitted a full and fair opportunity to defend their interests (whether as creditor of or debtor to the insolvent insurer). This objective is related to the need for transparency, but it also mandates fair notice to stakeholders of matters affecting their interests; a meaningful right to appear and be heard; fair and disinterested review by the receiver (e.g., on claims adjudication) and by the supervising court; and a real right to appeal from adverse decisions. There should be no "thumb on the scales" that disadvantages any given stakeholder in relation to other stakeholders or to the receiver.

Accountability. As is true for everyone in a position of great responsibility, receivers must be accountable for their actions in the conduct of receiverships. Most receivers are accountable to some extent in modern receivership proceedings, but proposals have been made in the name of receivership law "reform" to cloak not only receivers but all of their agents with blanket and virtually complete immunity for actions by any of them. Such proposals, particularly if coupled with proposals for substantive and procedural constraints on the rights of stakeholders to contest receivers' decisions, undermine the goal of accountability.

Efficiency & effectiveness. The expenses of administering a receivership are paid as a first-priority claim on estate assets. Administration expenses decrease the assets available for distribution to creditors. For that reason, the receiver, as the equivalent of a trustee for estate creditors, owes what amounts to a fiduciary obligation to the creditors to minimize expenses consistent with the proper and timely performance of his or her job. However, the obligation to minimize expenses is not an excuse for limiting the flow of relevant and material information to stakeholders, nor for limiting notice to them or the opportunity to participate appropriately in the receivership proceeding. Stated differently, the goal of minimizing expenses does not trump the goals of openness, transparency, and accountability, which together have the effect of promoting efficiency and effectiveness.[1]

Clear "ex ante" rules. As observed at the beginning of this list, laws governing receiverships are integrally related to the overall system of regulating insurance, just as the bankruptcy laws are integrally related to the regulation of corporate finance. Those doing business with insurance companies—potential stakeholders in a receivership—have a right to know in advance of any potential receivership ("*ex ante*," as economists say) the procedural and substantive rules that will apply in the event an insurer fails, in order to be able to take those rules into

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Receivership rules must be an extension of the regulatory principles that applied to the company while it was healthy. Perhaps more important, financial regulation of a "live" company must be done with an eye to the effect of supervisory and regulatory measures should the company enter receivership.

Closer to

The NAIC completes its draft receivership model law

On April 25, 2005, the NAIC's Model Act Revision Working Group (MARG) completed drafting a new NAIC Receivership Model and voted unanimously to approve the draft for consideration and approval by the NAIC's Receivership and Insolvency Task Force. This vote marks the close of a multi-year effort to produce an updated and revised draft of the NAIC's model receivership statute (see "A New Receivership Law," January 2005 *NOLHGA Journal*, p. 5). The draft has been circulated to task force members, and the task force is expected to consider the proposed model during a conference call scheduled for May 13. If approved, the model will likely be presented by the task force to E Committee in conjunction with the June NAIC meeting for a vote sometime thereafter. No final action by NAIC plenary is expected before the September NAIC meeting.

Work on this project began in early 2001, when the MARG was charged with producing a revised model receivership statute using the current NAIC Insurer's Rehabilitation and Liquidation Model Act as a starting point and incorporating provisions of the Uniform Receivership Law. Efforts over the last year have been stepped up to include twice-weekly, two- to three-hour teleconferences during which the MARG worked on the draft through a shared online viewing application; lengthy drafting sessions at all NAIC national meetings; and interim two-day, in-person drafting sessions at the NAIC's headquarters. The working group's proposed 2005 model, which will be cited as the NAIC's Insurer Receivership Model Act, is the culmination of those efforts.

Throughout this multi-year effort, NOLHGA has been active as an "Interested Party" participant. While Interested Parties are not voting members of the MARG, NOLHGA has provided, in consultation with NOLHGA's Legal Committee, both verbal and written input, comments, and suggestions. Other Interested Party participants have included the National Conference of Insurance Guaranty Funds, the American Council of Life Insurers, the Reinsurance Association of America, interested regulators, and other industry representatives.

NOLHGA's involvement has been focused upon bringing the guaranty association perspective to the table to protect the rights and interests of life and health insurance guaranty associations. In that regard, we believe that the 2005 proposed draft incorporates noted improvements over the current NAIC model in many areas important to the associations, including intervention rights, cooperation and information sharing, early access, distribution priority, and the treatment of guaranty association expense claims.

However, in other areas of the model, NOLHGA and other Interested Parties suggested approaches different than those ultimately chosen by the MARG; these areas include the financial reporting, notice, and court approval provisions. In addition, many Interested Parties have expressed concerns regarding the need for an exposure period to give task force members and others an opportunity to review the proposed model in its entirety at one or more public hearings before a final vote is conducted.

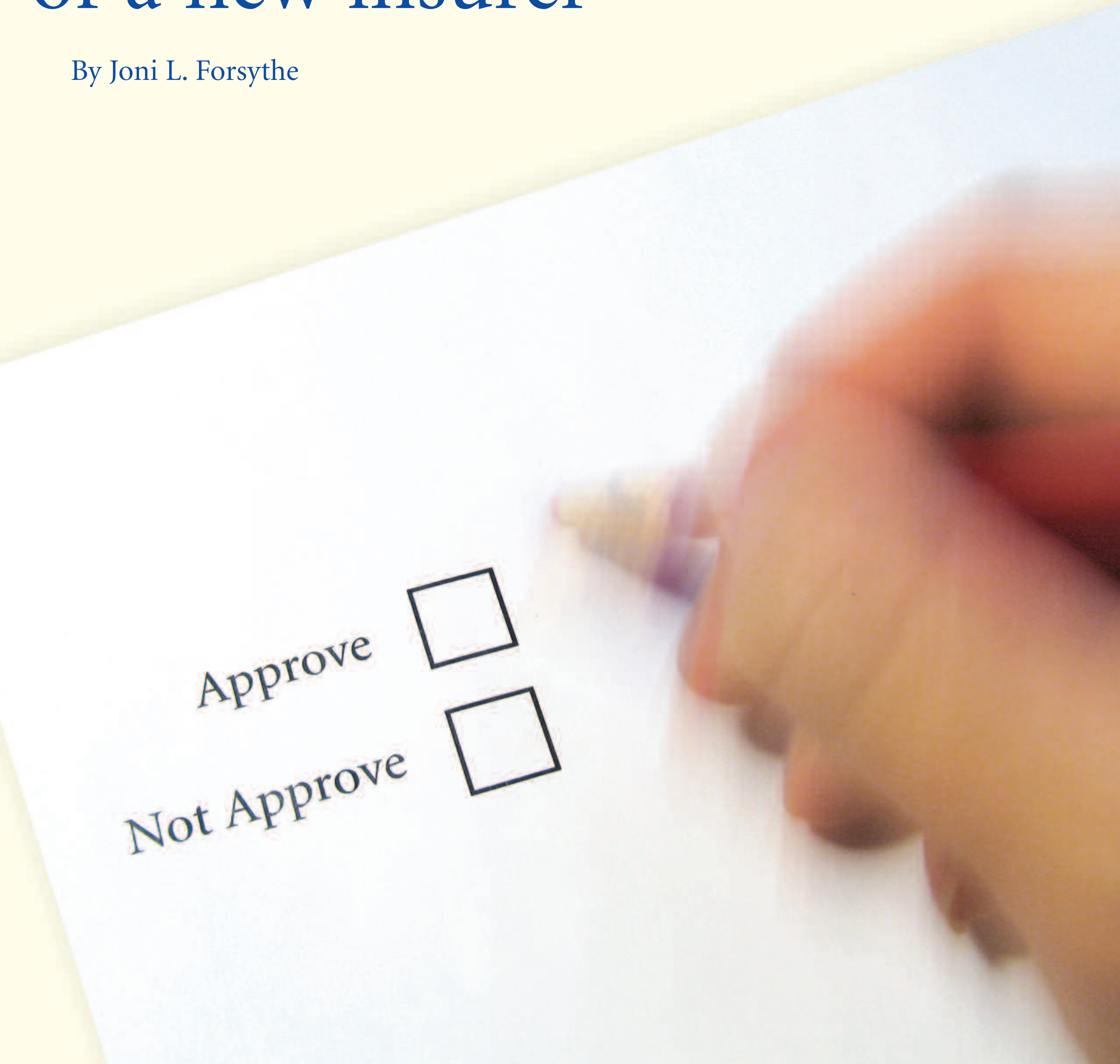
The 2005 Insurer Receivership Model Act represents a comprehensive rewrite of the NAIC's receivership model. It incorporates concepts from the Uniform Receivership Law, bankruptcy law, and many other sources. It also incorporates new approaches to interstate relations, claims adjudication procedures, and the role of the courts—as well as an entirely new chapter governing conservation proceedings, which are intended to play a far more prominent role in the process than they have in the past. NOLHGA is still in the process of reviewing the final draft approved on April 25 and has taken no formal position with respect to the proposed model.

NOLHGA will continue to closely monitor developments with respect to the proposed model and to provide comments, input, and suggestions, as appropriate. A copy of the April 25 version of the proposed new model is available on the NAIC Web site (www.naic.org) under the link for "Insolvency Task Force and Working Group Activities" (go to the "Members" section of the site and select "Receivership Information"); the text includes instructions for submitting comments to the NAIC. You may also request a copy of the current draft by contacting Aimee Frye at NOLHGA (afrye@nolhga.com or 703.787.4115). ✯

Joni L. Forsythe is senior counsel for NOLHGA.

a Vote
of a new insurer

By Joni L. Forsythe



["Lawrence Mirel" continues from page 1]
may not know yet themselves. Probably most people in the House and Senate haven't thought about the issue.

Q. *The NAIC recently sent a letter to Rep. Oxley stating that the State Modernization and Regulatory Transparency (SMART) Act is going down a road the NAIC wouldn't recommend. Where are relations between Rep. Oxley's committee and the NAIC in light of these disagreements over the SMART Act?*

A. I thought that was an unfortunate letter. It seems to me that the NAIC has been invited by Rep. Oxley to engage in a conversation to talk about how to make the bill better, and the NAIC should respond to that and be willing to work with Congress. That does not mean that at the end of the day the NAIC has to support what comes out, but it seems to me that it's just self-defeating to take the kind of attitude that was expressed in that letter.

There's a feeling at the NAIC, and I've seen this and heard it from various people at the NAIC, that somehow this is a violation of separation of powers—that the states ought to be able to regulate insurance and Congress should leave us alone. That's just not correct. The only reason there's state regulation today is because of a federal statute—the McCarran-Ferguson Act. If McCarran-Ferguson had not been enacted, there would be no state regulation. So to say that the federal government has no role and should butt out of our business is just not correct. We're at the mercy of the federal government, and we always have been. Congress could repeal McCarran-Ferguson if they wanted to, and that would be the end of state regulation. They haven't suggested anything like that, and I think that's why we should be favorably responding to Rep. Oxley's invitation.

There's a feeling at the NAIC… that somehow this is a violation of separation of powers—that the states ought to be able to regulate insurance and Congress should leave us alone. **That's just not correct.**

Q. *Do you get the feeling that when it comes to the idea of Congress simply leaving the states alone, that's not even an option anymore?*

A. I think it's very unlikely in the long run that Congress will leave us alone, as you suggested. As I said, I don't know whether there's enough momentum to get a law enacted this year. But there's certainly a determination on the part of many people in Congress to do something, and I think that sooner or later that's going to prevail. And we have to get ready for it and make sure that what comes down the pike is the best it can be.

Q. *How have the Spitzer investigations affected Congress's actions? Is regulatory reform moving faster, slower, or on a different track?*

A. I think it had some impact. I don't think it's the major driver. But I think there is some impact, because people see that Spitzer is getting some strong reaction to the kind of stuff that he's pointing out. And Congress feels, I think, a stronger obligation to take steps than it did before. So it probably has strengthened, to some degree, the action in Congress. But I think the desire was there anyway.

Q. *What about their impact on the NAIC's modernization efforts?*

A. I haven't seen that. What I have seen is that the NAIC is very engaged in trying to modernize regulation, quite aside from what Spitzer did. And there are many things going on at the NAIC to try to provide some uniformity in the system. And those are good things.

I know that Spitzer's efforts have created quite a stir at the NAIC, but it's all centered around whether we should respond to his findings by changing the rules regarding broker compensation. I haven't seen any spillover to the other side. I don't think anybody at the NAIC thinks we should not do everything possible to create uniformity among the states. On certain issues, there are disagreements—such as prior approval of private passenger auto rates. That's a big issue of contention. But I think there is a true commitment on the part of the NAIC to try to work toward a more rational, more uniform system.

Q. *We're several years into the NAIC's efforts along those lines. What has been accomplished, and what remains to be done?*

A. I can't really give you a full list, but let me try to highlight some. I think the most significant thing that's been accomplished so far is the commitment itself—the awareness and the willingness on the part of state commissioners to work together toward greater uniformity. That's been sort of a sea change in attitude, which is important. Nothing is going to happen without that.

The difficulty is when you get into the details. There have been several attempts to try to come to grips with these issues, the most recent of which is the Interstate Compact. But only a handful of states have adopted the compact into law because there is some controversy about it among attorneys general and groups like NCOIL [National Conference of Insurance Legislators]. Making it happen on a specific basis is very hard, and it's particularly hard, in my view, because the structure of the NAIC doesn't lend itself to reaching the kinds of conclusions that we need to reach.

The NAIC is a consensus organization made up of states, territories, and the District, each of which has one vote regardless of size. What that tends to mean is that the general consensus in the NAIC is a consensus of smaller jurisdictions, and the larger jurisdictions tend to stay out of it. That's been a problem. It was a problem with the NARAB [National Association of Registered Agents and Brokers], and it's going to be a problem with any attempt we make to come to an agreement.

There's been another effort that some people at the NAIC think goes against the Interstate Compact effort, although I don't agree with that. It's an agreement of California, Texas, and Florida to have joint approval of new products. *[Editor's Note: Georgia and Nevada are also participants in this arrangement.]* They signed an agreement that's about a year old now, I think, under which California, Texas, and Florida jointly review new product filings, and if they are approved, the approval is good in all three jurisdictions.

That's a tremendous change, because those three jurisdictions amount to almost half of the total insurance market. New York, for some reason I'm not clear about, is not part of the effort. If it were, this program would cover more than half the total insurance market in the United States. They're doing this outside the Interstate Compact, and in my view there's a lot to recommend it. Because it doesn't require the formal agreement among the jurisdictions, you don't get into problems with the attorney general or the state legislature—it's simply an agreement among the commissioners to work together toward uniform approvals.

Although I'm a supporter of the Interstate Compact, I've always thought that it's more complicated than it needs to be. The way that those three states are putting together their program seems to me to be much more rational, and much more likely to succeed.

Q. *Do you see any other specific areas or tools not yet employed by the NAIC to improve national regulation that you believe show promise?*

A. I'm a big fan of deference—agreements among commissioners to defer to the domestic state regulator whenever possible. And I don't think we do enough of it. We do it in some areas—for example, for financial exams, we tend to go with the domestic state regulator as the primary examiner. But we don't do it in other areas, and I think we should—in licensing and new product approvals in particular.

We did something here in the District that I would love to see done on a nationwide basis, but so far no one else has picked up on it. We issued a bulletin, about two years ago, saying that if you are a company licensed in a jurisdiction that is accredited by the NAIC or is otherwise acceptable to us, you bring us that license and a letter of good standing not more than 30 days old, and we'll give you a District license. And I think that's the way it should be done. There is no reason why a company licensed by Pennsylvania, for example, needs to go through a separate licensing process to be licensed in D.C. Pennsylvania does a good job. Why don't we trust them?

I think the most significant thing that's been accomplished so far is the commitment itself—the awareness and the willingness on the part of state commissioners to work **together toward greater uniformity.**

There are two examples that come to mind when I think of this, both of which were inspirations for this bulletin we put out. One is the European Union system. They've developed something called a passport system, which says that the domestic regulator is the regulator for all purposes. So for example, a company licensed in France is permitted under EU rules to sell insurance in any EU country, and they don't need to get further regulatory approval. If there's a problem, it's the French regulator who's in charge. And I thought, why can't we do that in this country?

The other example is, I tried to think of a system we have in this country that is state-based where we give credence to other states. And the one that comes to mind is driver's licenses. There is no federal department of motor vehicles, and there's no federal driver's license. Each state issues its own. That doesn't mean that you don't have to obey local laws. You can't come into the District with an Ohio license and drive 80 miles an hour even if that's the speed limit in Ohio. You have to obey District law, and you can get arrested and put in jail if you don't. But we don't require you to get a license here.

Now, why do we require that of insurance companies? Can you imagine if you tried to drive across the country and every time you came to a state border, you had to stop and get a new driver's license? You'd never get across the country. But that's what we make insurance companies do, and it's wrong. You ought to be able to travel across the country with a single insurance license, not having to get one in every jurisdiction.

Q. *Why doesn't it work that way?*

A. I've been talking about this for a long time, and I get all kinds of objections. None of them make any sense to me. Some of it, I think, is purely protectionist—we want to keep people out of our jurisdiction. But I don't think that's the predominant problem. The predominant problem is that it's a different way of doing things, and change is just hard to get across.

I experienced it with my own department when we put the bulletin I mentioned into effect. A company came along and applied for a license on a reciprocal basis, and my staff started looking at the application. I asked how long it would take to approve it, and they said they thought maybe they could get it done in a month. And I said, "No, you don't understand. What I want is, when they come in with a license from another jurisdiction and a letter of good standing, you give them our license immediately. It shouldn't take more than five minutes."

They were shocked at that. It went against everything they'd ever done. They asked, "How do we know who these people are? How do we know they have the finances?" And I said, "Because they have a license in Pennsylvania, and Pennsylvania has checked all that. Do you think Pennsylvania would give them a license if they're not qualified?" And they said, "But *we* don't know they're qualified." I understand the arguments against this concept, but they don't make any sense to me.

Q. *Has this policy been successful?*

A. We've only had a few instances of it. I think it's just not that widely known. A few companies have come here and become licensed that way, and we haven't had any problems.

Also, I've been trying with this initiative to get the NAIC Northeast Zone—which runs from Maine down to the District—to adopt it as a zone project. We've talked about it for a couple of years now, and there's been some real sympathy among some of the states for the idea of doing this as a zone. But a couple of the states have been reluctant to do it. So we've never managed to do it even at the zone level. But I haven't given up on it.

One other thing I wanted to mention is that I think technology, in the end, is going to solve this problem for us to a large degree. The program of electronic filing of forms and rates is being put together through the NAIC's System for Electronic Rates and Forms Filing project, or SERFF. We've been a big advocate of it here in the District. We do most of our stuff electronically, and in fact I was just elected chairman of the board of SERFF. I think it's going to be too difficult, if you have a nationwide electronic filing system, to apply specific state laws. It's going to screw up the system.

The nice thing about an electronic system is that it's fast and it's cheap. And in the end, I think that's going to overcome the individual state differences to a large degree. At least, I think it has that potential. ✭

Part two of our interview with Commissioner Mirel will appear in the next issue of the ***NOLHGA Journal****.*

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account in deciding whether and on what terms to deal with an insurer. This principle requires very strong justification for any grant of broad discretion to the receiver in making major substantive and procedural decisions, since such broad decision-making discretion directly conflicts with the concept of clear *ex ante* rules.

Concluding Observations

It is doubtless true, as some suggest, that the precise content of receivership statutes isn't everything when it comes to achieving a good result in a receivership; other matters, such as good working relationships among regulators, receivers, and stakeholders, are also critically important. Nonetheless, the applicable receivership statute defines the parameters of the substantive and procedural rights and obligations of regulators, receivers, and stakeholders. Because the room for negotiation and compromise in any receivership is constrained by the contours of the receivership statute, it is vitally important for a legislature to get the statute right. Individual provisions of a statute cannot effectively be drafted or evaluated except from the vantage afforded by a clear understanding of the overall goals the statute is intended to serve.

The preceding set of proposed goals or "first principles" for an insurance receivership statute are intended as something of a conceptual checklist for evaluating the merits of any proposal to reform the receivership process. No statute on any topic will ever be technically perfect, and most important statutes are the products of untidy legislative compromise. However, I submit that a receivership statute satisfying the goals described above is one that would receive broad support from the stakeholders that the receivership process is intended to serve. ✯

End Note

1. I do not suggest that the values of openness, transparency, and accountability should be established in a statute in ways that permit manipulation or "hijacking" of the process by parties who are not truly stakeholders. One helpful bankruptcy notion is to focus the thrust of these provisions on those who have real and legitimate interests in decisions being made in a particular insolvency. For example, in most receiverships, it is clear that equity owners and subordinated debt holders will under no circumstances receive estate distributions. Accordingly, those parties in such circumstances are not truly "stakeholders" except for limited purposes. Likewise, holders of fully secured claims have a minimal stake in most receivership decisions, provided their security interests are respected. The rights of, and duties owed to, such parties can be circumscribed in accordance with their real interest in a particular issue.

Peter G. Gallanis is president of NOLHGA.

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NOLHGA
13873 Park Center Road, Suite 329
Herndon, VA 20171
TEL: 703.481.5206
FAX: 703.481.5209
Editor: Sean M. McKenna
E-mail: smckenna@nolhga.com

NOLHGA Calendar of Events

2005

June 11–12	IAIR Roundtable and Meetings Boston, Mass.
June 11–14	NAIC Summer National Meeting Boston, Mass.
August 16–17	**MPC Meeting Park City, Utah**
August 18–19	**NOLHGA's 13th Annual Legal Seminar Park City, Utah**
September 10–11	IAIR Roundtable and Meetings New Orleans, La.
September 10–13	NAIC Fall National Meeting New Orleans, La.
October 9–11	ACLI Annual Conference Washington, D.C.
October 24	MPC Meeting Hilton Head, S.C.
October 25–26	**NOLHGA's 22nd Annual Meeting Hilton Head, S.C.**
December 3–4	IAIR Roundtable and Meetings Chicago, Ill.
December 3–6	NAIC Winter National Meeting Chicago, Ill.