 By Peter H. Bickford

Quo Vadis, NARAB?

Insurance producers can be forgiven for their skepticism toward regulatory efforts to create a uniform national licensing process. Over the past couple of decades, as producers found it competitively necessary to expand their reach beyond their home state, they were introduced to the wonderful world of state individuality – each jurisdiction with its own set of unique licensing requirements, application forms, fees and penalties. This hodgepodge system resulted in growing frustration by producers, not only with the administrative complexity, but also with the gotcha factor – the fines and penalties imposed for running afoul of these often onerous and inconsistent details.

The NAIC attempted to address producer complaints as early as 1996 by establishing the National Insurance Producer Registry (NIPR). However, too few states participated for the registry to provide any significant relief. Congress stepped in through a provision of the 1999 Gramm-Leach-Bliley Act, threatening the establishment of a national producer registry to be known as the National Association of Registered Agents and Brokers (NARAB) if targets for uniformity and reciprocity among the states were not achieved by November 2002. The threat of federal intervention provided sufficient incentive for the NAIC to adopt the Producer Licensing Model Act, which was adopted by enough states to avoid the creation of NARAB. However, even with advances in electronic filings and the ability of regulators to share information, too many of the major states either did not adopt the Model Act or added their own quirks, preventing universal reciprocity and uniformity.

With the failure of the Model Act to provide the anticipated result, the call for the feds to establish a national registry began anew. After three failed attempts the legislation known as NARAB II was passed by Congress and signed into law in January of this year. The National Association of Registered Agents and Brokers is now about to become a reality and not just a carrot dangled before the NAIC. But will this two-decade-old effort to create a uniform national registry provide the promised benefits of one-stop universal licensing for producers?

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When up and running NARAB will allow any of the two million individual and 500,000 business entities licensed as insurance producers nationwide to become members of NARAB with authority to act in all 50 states. To become a member, a producer must be a licensee in good standing in the producer's home state. Membership will be voluntary and producers will remain free to continue to be licensed only in states of their choosing by meeting the individual requirements of those states.

But why would a producer elect to continue to be subject to the inconsistencies of individual state licensing requirements? The most obvious reason would be cost. NARAB will be a non-governmental entity that will be funded primarily by application and membership fees (and fines?). No one knows what NARAB's fee schedule will look like but it is quite likely that it will not be cost effective for a small or regional producer needing to be licensed in only a few states. While it is hoped that NARAB will have broad industry appeal, it may turn out that the cost of membership in NARAB will only benefit producers that are active on a full or nearly full national level.

Then there is the "devil I know" factor. Will NARAB's application process and criteria be more onerous than those of individual states? If NARAB rejects membership, will that rejection affect the producer's status in its home state or in its ability to seek individual state licenses? And how will a national registry affect a producer's relationship with local and regional insurance departments, particularly in dealing with difficult customer issues that are bound to occur in any active business? The Tri-State area is a good example where small firms might choose to remain licensed only in NY, CT and NJ and avoid the national registry altogether for cost and policy reasons.

Even for national producers the benefits might not prove to be all that clear. The statute specifically provides that the states retain regulatory authority over "market conduct, insurance producer conduct, or unfair trade practices," and there are a number of provisions regarding disciplinary actions, data sharing and other areas that could continue to result in inconsistent and duplicative treatment at the state level.

One of the more insidious effects of the current fractured system is the practice of multiple state fines for one violation. Failing to report a fine in one state for even a simple clerical error often results in cascading fines from multiple states. If you review the Disciplinary Bulletins issued by the NY Department of Financial Services, for instance, you will see that the most common basis for fines imposed on producers is for failing to timely disclose a fine or disciplinary action by another state, and many of the underlying offenses are for minor

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offenses. With states now having access to the electronic records from other states, this "gotcha factor" has become a dependable revenue source for regulators, much to the continuing chagrin of producers.

If producers were hoping that the establishment of NARAB would eliminate these cascading fines, that hope might not materialize. Yes, the law proscribes that states cannot take any action to "impede the activities of [or] take any action against" any producer because that producer is a member of NARAB. However, you do not have to look any further than the decades-old interference by states with risk retention groups formed under the federal 1986 Liability Risk Retention Act to understand the potential for state shenanigans.

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Finally, there is the issue of when this will all happen. The law does not go into effect until the later of two years after it became law or until NARAB is incorporated. So the earliest that NARAB can function as a national registry is January 2017 – twenty-one years after NAIC's first attempt at a nationwide registry through NIPR. More than likely, however, it will be well after that date before NARAB is functional. Consider that the law specifically requires that its first board "shall be made no later than 90 days after the date of enactment." That date has come and gone twice over.[IA]

Peter Bickford has over four decades of experience in the insurance and reinsurance business, with particular focus on regulatory, solvency, agency, alternative market and dispute resolution issues. In addition to his experience as a practicing attorney, he has been an executive officer of both a life insurance company and of a property/casualty insurance and reinsurance facility. A complete biography for Mr. Bickford may be accessed at www.pbnylaw.com.

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