[INSIGHT] By Peter H. Bickford

A Matter of Opinion

Q: May a licensed insurance agent or broker co-sponsor seminars with a law firm in order to provide general insurance advice to employers? A: Yes. (NY Insurance Department, Office of General Counsel Opinion No. 11-01-07)

Q: May an insurer require a third-party claimant to execute a release before the insurer will pay a settled claim? A: Yes. (OGC Op. No. 11-04-01)

Q: May a licensed insurance producer, upon the request of a New York state agency, complete a certificate of insurance that effectively amends, expands, or otherwise alters the terms of the applicable insurance policy? A: No. (OGC Op. No. 11-01-08)

These are but a few randomly selected Office of General Counsel opinions issued by the New York Insurance Department in 2011 before the Department was merged into the Department of Financial Services in October of that year. These opinions are representative of the numerous opinions that have been requested over the years by or on behalf of regulated entities – whether agents, brokers, insurers or other licensed service providers — about certain fact situations or circumstances that are not specifically addressed in the insurance law or promulgated regulations, or where there was uncertainly in their interpretation. Rather than facing penalties, fines, disruptions in the conduct of business or worse, regulated entities regularly sought to understand the position of their regulators by requesting an opinion based on a specific set of facts or circumstances.

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For the eleven-year period 2000 through 2010, the NY Insurance Department issued 2,682 general counsel opinions—an average of 244 per month—providing the insurance industry and its advisors with invaluable insight into and understanding of the Department's interpretation of the insurance law and promulgated regulations. In the nine months of 2011 before the merger, there were 41 opinions issued. Since the birth of the Department of Financial Services in October 2011, there has not been one single Office of General Counsel Opinion issued.

What has precipitated this "cold turkey" withdrawal from the issuance of advisory opinions, and does this mean that the industry can no longer ascertain how its regulators will react to a specific set of facts or circumstances under a broad or non-specific statute or regulation?

First some background: Section 301 of the NY insurance law grants the superintendent authority to prescribe regulations for the purpose of, among other things, interpreting the provisions of the insurance law. Regulation #1 (Yes! There is a Regulation #1!) outlines the requirements for promulgating, recording and indexing regulations, but also authorizes "[t]he superintendent, all deputy superintendents, the department counsel and bureau heads" to issue written opinions. The regulation gives specific requirements for the information to be provided and considered, and the scope of any opinion. The regulation concludes that "[a]n opinion is deemed to be sufficiently important as a guide to the future action of the Insurance Department [now the DFS] to justify the keeping of a permanent record thereof . . ." In other words, OGC opinions, along side regulations and circular letters, have long been recognized as an integral part of the regulatory scheme in New York. The importance and value of OGC opinions is also demonstrated by the frequency in which they are cited as authority in legal texts and court decisions.

Interestingly, Regulation #1 authorizes any deputy superintendent or bureau head to issue opinions, not just the department counsel. For as long as I can remember, however, opinions have been issued solely through the Office of General Counsel. These opinions have been regularly published even if they are in response to a very specific and limited set of facts. The opinions are currently available on the DFS website back to 2000, and are in a searchable format so you can find opinions related to a specific issue or a range of issues.

Why has the DFS abruptly stopped issuing opinions? There is no official statement on the record explaining this decision. The only statement on the Opinions page of the DFS website is: "More information coming soon." It has been fifteen months since the moratorium was instituted. An explanation is long overdue!

With the consolidation of insurance, banking and consumer services under one roof, and an overhaul of the statutory framework for enforcement of the law against regulated entities, the need to understand regulators' positions under the law is greater than ever. Perhaps it is understandable why a new administration would seek a brief moratorium to coordinate the issuance of opinions under the newly implemented merger to ensure consistency and refinement of the criteria. The DFS may also believe that opinions were being requested too frequently or for trivial matters. Narrowing the scope of issuance is one thing; eliminating them altogether, however, is an overly drastic remedy.

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insured not having read the policy would be one of comparative negligence, not an absolute bar to the insured's claim.

A Second Department Appellate Court decision was just published holding essentially the same position. The decision affirmed the Supreme Court's denial of summary judgment to the insurance company. The court held that broker "did not satisfy its … burden of demonstrating that the plaintiffs' failure to read the terms of the applicable insurance policies, despite their having been in effect for approximately nine months prior to the fire, warranted judgment in its favor as a matter of law.[9]

We'll have to wait to see if the insured will actually be indemnified for its loss. If the parties settle, there may be no published decision on the resolution of the insured's claim.

As I pointed out, these cases represent a loosening of the standard for insurance broker E&O in New York. I should have mentioned one area where a broker does have a clear obligation to the insured. That's the obligation "to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so."[10] The issue to be resolved now is whether the insured's failure to read the policy, and complain about its shortcomings, will outweigh the insured's claim that the broker did not obtain the requested coverage.

On the plus side for agents and brokers, there doesn't seem to be any change in the court's position that agents and brokers "have no continuing duty to advise, guide or direct a client to obtain additional coverage." (Although New York courts don't see any legal obligation for agents and brokers to advise clients once the policy has been procured, I think there's an ethical obligation. And besides, it's good way to build lasting relationships with clients.)

Improving Crime Protection for Employee Benefit Plans

In the January 24, 2011 issue of the Insurance Advocate. I recommended combining the crime protection for a firm with the coverage ERISA requires for the firm's employee benefit plans in. The chief advantage of combining them is the increased limit available to both the plans and the firm, if the amount of insurance carried by the firm on its own is increased by the amount that the plans would carry in separate policies. To illustrate, if the firm has $2,000,000 crime coverage and the plans would carry $500,000 on their own, the combined policy would have a $2,500,000 limit.

One of the other advantages that I cited was broader coverage for the plans beyond just the employee theft. For example, the firm has have funds transfer fraud coverage (and should) that could apply to the plan also. What I should have pointed out is that the combined policy will have to be extended to provide coverages other than fidelity. ISO's and other insurers' standard crime wording provide only fidelity insurance for employee benefit plans. Employee benefit plans are exposed to crime perils in addition to employee theft.

Pension, profit-sharing, and 401k plans can have substantial assets that need protection. One of our clients, a firm with approximately 50 employees has over $10,000,000 in it employee benefit accounts.

Even without the added coverages for the ERISA plans, I still recommend combining the coverages. A stand-alone ERISA fidelity bond that I looked at named the ERISA plan as the named insured. It defined "employee" to mean an "employee, trustee, officer, administrator or manager" of the ERISA plan. The only non-employees covered were directors or trustees of the plan sponsor while handling funds or other property belonging to the plan. That leaves out coverage for theft by an employee of the sponsor who is not an employee, trustee, officer, administrator or manager of the plan. Under a combined policy, an employee of any insured is considered to be an employee of every insured.

Get the policy amended. Many insurers will broaden your insured's coverage. [IA]

9 *Gagliardi v Preferred Mut. Ins. Co. 2013* NY Slip Op 00179 January 16, 2013 There is no mention in the decision of the Court of Appeals decision in Petrocelli. This decision may have been written before the Petrocelli case was published.

10 *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]

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If you look at the record of the number of opinions issued, it tends to track major insurance or financial events. For instance, the number of OGC opinions issued spiked considerably in the years following 9-11, including a high of 369 opinions issued in calendar year 2002. Toward the end of the century the number tapered off considerably to a total of 85 opinions posted for the calendar year 2010. It would seem that the merger of banking, insurance and consumer services would qualifies as a major insurance regulatory event, making it even more difficult to understand a moratorium on OGC opinions.

For the DFS to go "cold turkey" on rendering opinions following the implementation of the merger and enforcement of the revised statutes is unconscionable. There is simply no excuse for failing to recognize the value and importance for both the regulators and the regulated to have a means of determining how the law and promulgated regulations will be interpreted and enforced under different facts and circumstances. *Shutting down the process entirely for over 15 months is not only a disservice to the industry, but also to the professional staff of the DFS, who have as much an interest in providing clarity to their positions as regulated entities do in understanding the position of the regulators.* There will never be full agreement between regulators and regulated entities over the interpretation and implementation of the law, but it is essential for both sides to understand and appreciate the differences to the fullest extent possible. OGC opinions have historically provided a means of obtaining a clear understanding of those differences in a manner that can be relied upon in determining a course of action in the successful conduct of the business of insurance without the fear of unknown or unanticipated repercussions.

If the law and regulations are to be a guide for the proper conduct of business rather than a trap to punish the unwary, then bring back the OGC opinion process as soon as possible![IA]