[INSIGHT] By Peter H. Bickford

A Golden Opportunity!

Welcome to my 50th Insight Column! I guess that makes it some kind of golden anniversary. But I look at it more as having been provided with a golden opportunity.

For the past two and a half years my column has been addressing the natural tension between insurance regulators and regulatees, particularly where regulated entities face unreasonable, exacerbating and often puzzling positions by functionaries with potentially life or death control over their businesses. After four decades of experience in all aspects of the insurance business, I admit it has been cathartic to be free from the burden of forced smiles and bitten lips, and free to address controversial views without fear of regulatory consequences (although I have been cautioned to avoid dark alleys and window seats in restaurants).

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A review of my past columns reveals a number of recurring themes, including:

- *The often hypocritical view by regulators of the concept of transparency*

The best examples of the disconnect between regulatory openness and reality are the "incredible shrinking annual reports" of NY's superintendent and the need to make freedom of information requests – not always granted – for information that should be made publicly available as a matter of course and good government. It is hard to understand the mindset of regulators restricting access to public information, or how they reconcile their own closed-door practices with a stated policy of requiring openness and transparency by others.

- *Laws, rules and regulations that serve no regulatory purpose, contradict their stated objective, or place undue burdens or costs on the industry and its customers*

Anyone in the business who has ever had responsibility for preparing and filing reports, statements, questionnaires or other required information with state insurance departments knows all too well that many of these filings and much of the information provided to the regulators is of little, if any, practical value to effective regulation. Stories about meaningless, redundant, arcane, time consuming and costly filings and requirements are customary fodder for exasperated hallway commentary among knowing and sympathetic colleagues. Unfortunately, too often the fear of reprisals — both real and imagined — squelches anything beyond sharing your forehead with the nearest wall or kicking the water cooler in frustration.

- *The State, National and International trends towards severe financial regulation of insurance*

For decades the theme was the struggle between state and Federal regulation of the insurance business, but that battle has been mostly won by the Feds through erosion and the 2008 financial crisis, even though the insurance sector actually performed very well during that crisis. What the regulators (and many companies) may not fully realize yet is that the State v. Fed battle has been superseded by the obsessive focus on capital requirements, and the growing International trend to apply strict bank-centric standards to all financial institutions including insurance. And because the International regulators are so far ahead of the US in this regard, even the Feds are in danger of losing the ultimate control over setting the financial rules to the International community. In the end, they may win the battle and lose the war.

- *The growing lack of knowledge of or respect for the business of insurance*

There have been numerous commentaries of late that the paradigm (hate that word) in insurance regulation has shifted from a focus on control and oversight to enforcement. This is not a new trend, but it has become much more pronounced in the last few years. Nowhere is this shift more pronounced than in New York. Once known as the standard for industry knowledge, expertise and regulatory leadership, the 150-year-old New York Insurance Department has become a lesser division of a new Department of Financial Services, run by former prosecutors focused on enforcement over oversight and financial punishment over industry growth and development, or consumer needs and expectations. While some may applaud this focus on "financial stability," doing so at the expense of the underlying business of insurance and its customers leads inevitably to a deterioration of knowledge of these needs and expectations. Ignoring leads to ignorance, and ignorance leads to a lack of respect. If the regulators do not respect the industry being regulated, that industry cannot thrive or properly support its customers.

And last but definitely not least:

- *The defective, inefficient and ineffectual state receivership process including the state guarantee fund system*

I have been writing and speaking about the insurance insolvency process (some would say obsessively – See "Serio on Bickford," **IA**, August 18, 2014) for over 20 years. One of my first articles, published in **Business Insurance** magazine in 1991, focused on a number of myths surrounding the state insolvency process. Unfortunately, the five myths addressed in that article are still believed by many today. They are:

- Liquidators are regulators;
- Regulators are the best parties to act

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as liquidators;

- The interests of liquidators are the same as the interests of regulators;
- Liquidators are properly accountable for their actions; and
- Liquidation is in the best interest of the policyholders of an insolvent insurer.

The answer to each of these myths is the same today as it was 23 years ago: They are not! (A copy of the full **BI** article can be found on my website at www.pbnylaw.com/publications.)

When all is said and done, the state receivership process – now euphemistically called "estate resolution" – has failed to address any of its defects and shortcomings over the past two decades, and is the one area that could very well prove to be the final undoing of state regulation of insurance. Supporters point out that the state receivership system has worked remarkably well over the past decades, proving its value and effectiveness. To the extent the system has succeeded, however, it has been more a matter of luck, industry participation and the effectiveness of state regulation in avoiding significant insolvencies.

The sad irony is that the current focus of National, Federal and International regulators on preventing insolvencies through excessively high capital and other financial requirements overshadows the long history of effective state regulation of the business of insurance.

Although state receivers continue to argue that the state system is quite capable of handling the receivership of a major insurer, including any company the Feds may consider as a systematically important financial institution (SIFI), the myth of the effectiveness of the state system's ability to handle a major national insolvency was shattered by the Executive Life saga, both in California and New York. Despite all the legislative and regulatory attempts to sweep the scope and consequences aside, Executive Life has dramatically exposed the deficiencies in the receivership process and the failure of the guarantee funds to fully and adequately protect policyholders. The sad irony is that the current focus of National, Federal and International regulators on preventing insolvencies through excessively high capital and other financial requirements overshadows the long history of effective state regulation of the business of insurance. Effective regulation of the business, however, is no longer the norm. Now it is all about capital and enforcement.

My goal with this column has centered on exposing important regulatory issues to free and open debate, and to encourage regulators and their enablers to listen to themselves and to better understand the consequences of their actions.

Thanks again to Steve Acunto and **Insurance Advocate** for providing me with this golden opportunity.[IA]