2011 in Review: 10 Biggest Insurance Regulatory Headliners

2012 Emerging Issues 6198

2011 in Review: 10 Biggest Insurance Regulatory Headliners

By Fred E. Karlinsky, Richard J. **Fidei** and Elizabeth M. Fohl

February 2, 2012

SUMMARY: Highlights of insurance regulatory developments in 2011 include the Insurance Holding Company System Model Act and Regulation amendments, new Model Unclaimed Life Insurance Benefits Act, extension of the National Flood Insurance Program, new state requirements as to certificates of insurance, new state laws implementing the federal Patient Protection & Affordable Care Act, and implementation of the federal Nonadmitted and Reinsurance Reform Act.

RELATED CONTENT: Click here for more Emerging Issues Analysis related to this Area of Law

ARTICLE: I. Amendments to Holding Company Model Act and Regulation

As a result of an increased focus on systematic risk affecting insurance companies and their affiliates, among other factors, the National Association of Insurance Commissioners ("NAIC") amended its Insurance Holding Company System Model Act and Regulation (Models 440 and 450) to expand regulators' reach over insurance holding company systems. The following highlights some key amendments to the Model Act and Regulation:

A. Divestiture

In response to a parent company donating its ownership interest in an insurer to several charities in percentage amounts that would not require notice or approval of the acquisition, the NAIC amended the Model Act and Regulation to require prior notice of the proposed divesture. The amendments require any controlling person of an insurer seeking to divest its controlling interest to file with the commissioner confidential notice of its proposed divesture at least 30 days prior to the cessation of control. After submission of the notice, the commissioner will determine whether the transaction requires a formal filing and approval.

B. Pre-Acquisition Notice

A Pre-acquisition Notice or Form E is required whenever there is a change in control of the insurer subject to certain limited exceptions. Before the amendments, a Form E filing was not required in connection with a Form A filing. In addition, Form E now requires that the acquiring party provide a determination of whether the acquisition or merger violates state competitive standards as stated in Section 3.1D of the Model Act. If the transaction violates state competitive standards, the acquiring party must provide justification as to why the transaction would not lessen competition or create a monopoly.

C. Transactions Subject to Prior Notice

The amendments to the Model Act expand the scope of agreements involving a domestic insurer and its affiliates which require prior notice to, and review by, the applicable regulator. The amendments to the Model Act and Regulation clarify that amendments and modifications to transactions that are subject to prior notice are required to be filed. In addition, with respect to terminations of previously approved affiliate agreements, "[i]nformal notice shall be reported . . . to the Commissioner for a determination of the type of filing required, if any" within 30 days after such termination.

Concerning affiliate reinsurance agreements, the prior Model Act required filing of only agreements in which the reinsurance premium or a change in the insurer's liabilities equaled or exceeded five percent of the insurer's surplus as regards policyholders. The amendments now require filing of reinsurance agreements, or modifications thereto, in which the "projected reinsurance premium or a change in the insurer's liabilities in any of the next three years" equals or exceeds five percent of the insurer's surplus as regards policyholders. Additionally, filings are specifically required for all affiliate reinsurance pooling agreements and all tax allocation agreements.

The amended Model Regulation requires a statement that the transaction is "fair and reasonable." Also, a brief summary of the effect upon the insurer's surplus should be included for management, service, and cost-sharing agreements. Other statements to be provided include whether the cost allocation methods used are based on "cost or market" and confirmation of compliance with the NAIC Accounting Practices and Procedures Manual.

The NAIC amendments include new requirements for agreements for cost sharing services and management services. At a minimum and as applicable, agreements for cost sharing services and management services are required to:

- Identify the person providing services and the nature of such services;
- Set forth the methods to allocate costs;
- Provide for timely settlement, not less frequently than on a quarterly basis, and compliance with the requirements in the Accounting Practices and Procedures Manual;
- Prohibit advancement of funds by the insurer to the affiliate except to pay for services defined in the agreement;
- State that the insurer will maintain oversight over functions provided to the insurer by the affiliate and that the insurer will monitor services annually for quality assurance;
- Define books and records of the insurer to include those developed or maintained under or related to the agreement;
- Specify that all books and records of the insurer are and remain the property of the insurer and are subject to control of the insurer;
- State that all funds and invested assets of the insurer are the exclusive property of the insurer, held for the benefit of the insurer, and are subject to the control of the insurer;
- Include standards for termination of the agreement with and without cause;
- Include provisions for indemnification of the insurer in the event of gross negligence or willful misconduct on the part of the affiliate providing the services;
- Specify that the affiliate will continue to maintain any systems, programs, or other infrastructure notwithstanding a seizure by the commissioner under the State Receivership Act, and will make them available to the receiver, for as long as the affiliate continues to receive timely payment for services rendered;
- Specify that, if the insurer is placed in receivership or seized by the commissioner under the State Receivership Act:
- all of the rights of the insurer under the agreement extend to the receiver or commissioner; and,
- all books and records will immediately be made available to the receiver or the

commissioner, and must be turned over to the receiver or commissioner immediately upon the receiver or the commissioner's request; and,

Specify that the affiliate has no automatic right to terminate the agreement if the insurer is placed in receivership pursuant to the State Receivership Act.

D. Enterprise Risk Report

The most dramatic change to the Model Act and Regulation is the new requirement to file an Enterprise Risk Report or Form F. It requires the ultimate controlling person(s) to provide information identifying potential enterprise risk to the insurer or the holding company system as a whole. "'Enterprise risk' is any activity, circumstance, event, or series of events involving one or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including anything that would cause the insurer's RBC [risk based capital] to fall into company action level or would cause the insurer to be in hazardous financial condition."

Form F is required to be filed annually or upon request by the regulator. In connection with a Form A filing, the acquiring party must agree to file information within Form F. Alternatively, companies may submit their most recent parent corporation report that has been filed with the Securities and Exchange Commission ("SEC"), but only as long as it includes specific references to the areas required in the Form F. The information required to be included in Form F includes the following:

- Any material developments regarding strategy, internal audit findings, compliance, or risk management affecting the insurance holding company system;
- Acquisition or disposal of insurance entities and reallocating of existing financial or insurance entities within the insurance holding company system;
- Any changes of shareholders of the insurance holding company system exceeding 10% or more of voting securities;
- Developments in various investigations, regulatory activities, or litigation that may have a significant bearing or impact on the insurance holding company system;
- Business plan of the insurance holding company system and summarized strategies for the next 12 months;
- Identification of material concerns of the insurance holding company system raised by a supervisory college, if any, in the last year;
- Identification of insurance holding company system capital resources and material distribution patterns;
- Information on corporate or parental guarantees throughout the holding company and the expected source of liquidity should such guarantees be called upon;
- Identification of any negative movement, or discussions with rating agencies which may have caused, or may cause, potential negative movement in the credit ratings and the individual insurer financial strength ratings assessment of the insurance holding company system (including both the rating score and outlook); and,
- Identification of any material activity or development of the insurance holding company system that, in the opinion of senior management, could adversely affect the insurance holding company system.

E. Financial Statements

The amendments specify that if the commissioner requests, the insurer is required to provide financial statements of or within the insurance holding company system, including affiliates. This may include annual audited financial statements filed with the SEC. An

insurer may satisfy these requirements by filing its recently filed parent corporation financial statements that have been filed with the SEC.

F. Role of the Board of Directors

In response to earlier drafts circulated by the NAIC, the proposed amendments were criticized regarding the role of an insurer's board of directors and certain statements pertaining to corporate governance required by the board of directors in the holding company system registration statement. Several industry trade associations urged the NAIC to not require certain representations and warranties by the board of directors. This was in part based on the industry's position that longstanding corporate governance laws established by the states were satisfactory in this respect. The NAIC responded that this enhancement in the registration statement was to bring the registration statement in line with the NAIC Model Audit Rule and that such statements were not intended to modify applicable state insurance and/or corporate law requirements.

Ultimately, the amendments to the Model Act set forth two alternate provisions that may be adopted by the states. The first alternative would require a statement that the insurer's board of directors "oversees" corporate governance and internal controls. The second alternative would require a statement that the insurer's board of directors is "responsible for" and oversees corporate governance and controls. The latter statement provides for a heightened level of control and responsibility in the board of directors. If adopted as law, the states will need to choose the appropriate alternative to apply under its laws.

G. Examinations

Under existing standards, the commissioner has authority to order any insurer to produce books, records, and other information in the possession of an insurer or its affiliates. The amendments have significantly expanded the powers of the commissioner to examine any insurer and *its affiliates* to ascertain the financial condition of the insurer, "including the risk of financial contagion to the insurer by the ultimate controlling party, or by any entity or combination of entities within the insurance holding company system, or by the insurance holding company system on a consolidated basis." The effect of this provision is not definite as it is unclear how state insurance regulators will use the information obtained from these various reports and examinations.

H. Conclusion

In 2011, Texas, Rhode Island, and West Virginia enacted in some form the NAIC's amendments to the Model Act and Regulation. Many more states are expected to follow, especially if certain amendments are required for state accreditation by the NAIC. As states adopt and implement the amendments, regulators as well as stakeholders in the industry will be required to implement and address practices to ensure compliance with all applicable standards.

II. Certificates of Insurance

In 2010, several states took action specifically focusing on certificates of insurance. This concerted effort to clarify and strengthen laws related to certificates of insurance has carried over into 2011.

Arizona. In early January 2011, the Arizona Department of Insurance issued Bulletin 2011-01, which addressed the prohibited practice of misrepresenting insurance coverage when issuing certificates of insurance. The Bulletin reminds insurers that certificates of insurance must clearly and accurately state the insurance coverage provided and even though certificates of insurance are not filed with the Department, the underlying policy forms that are being summarized by the certificates of insurance are filed with and approved by the Department. It also provides that issuance of certificates that obscure or misrepresent insurance coverage or terms of an insurance policy violates Arizona law and may subject offenders to certain penalties.

Georgia. Also in early January 2011, the Georgia Office of Insurance and Safety Fire Commissioner issued Directive 11-EX-2, which requires that certificates of insurance include the following or a similar statement printed conspicuously and in no smaller than 10 point, boldfaced type:

"This document is issued as a matter of information only and confers no rights upon the document holder. This document does not amend, extend, or alter the coverage, terms, exclusions, conditions, or other provisions afforded by the policies referenced herein."

The Directive also sets forth several penalties that persons may be subject to for violating these laws.

A few months later, H.B. 66 (Ga. 2011) (adding Ga. Code. § 33-24-19.1), with an effective date of July 1, 2011, was enacted, which requires certificates of insurance to be filed with the Commissioner. A form will be disapproved if it is misleading or deceptive, among other similar reasons. In addition, the new law requires that the following or a similar statement be contained in the certificate of insurance:

"This certificate of insurance is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend, or alter the coverage, terms, exclusions, and conditions afforded by the policies referenced herein."

However, the Commissioner may approve a form that does not contain this particular statement as long as the form contains the following or similar statement:

"This certificate of insurance does not amend, extend, or alter the coverage, terms, exclusions, and conditions afforded by the policies referenced herein."

Forms promulgated by the Association for Cooperative Operations Research and Development ("ACORD") and Insurance Services Office ("ISO") are deemed approved by the Commissioner and are not required to be filed if they otherwise comply with the law's provisions. The new law also prohibits issuing or requesting a certificate of insurance that is false or misleading, and provides that a certificate holder is not entitled to notice of cancellation or nonrenewal unless named within policy and the policy requires notice to be provided. In addition, forms may not contain references to contracts other than the contract of insurance.

Kentucky. The Kentucky Department of Insurance issued Advisory Opinion 2011-02 in late April 2011, which reminds insurers that certificates of insurance are required to be filed with the Commissioner for approval. Insurers may develop their own forms or may adopt by reference ACORD or ISO forms.

The forms must contain the following or similar statement:

"This certificate or memorandum of insurance neither affirmatively or negatively amends, extends, or alters the coverage afforded by policy number _____ issued by _____."

The Opinion clarified that certificates of insurance are not of such a unique character that would except them from filing and approval. Certain penalties and other administrative actions were detailed in the Opinion.

Maryland. Effective October 1, 2011, H.B. 982 (Md. 2011) (adding Md. Code, Ins. § 19-116) was enacted to require that certificates of insurance be filed with and approved by the Commissioner. The law deems ACORD and ISO forms as approved. The Commissioner may disapprove of forms if they are unfair and deceptive, among other similar reasons. Each certificate must contain the following language:

"This certificate of insurance is issued as a matter of information only and confers no rights on the certificate holder. This certificate does not amend, alter, or extend the coverage provided by, or the terms, exclusions, or conditions stated in, the policy of insurance referenced in this certificate."

The new law also prohibits referencing a contract other the insurance policy, disallows issuing or requesting a certificate of insurance that is false or misleading, and provides that a certificate holder is not entitled to notice of cancellation or nonrenewal unless named within policy and the policy requires notice to be provided.

Massachusetts. The Massachusetts Insurance Commissioners issued Bulletin 2011-07 in early April 2011, which advises insurers and insurance producers that certificates of insurance are not the proper method to amend a policy and may create errors and omissions exposure and subject persons to penalties under the Massachusetts insurance laws.

Missouri. H.B. 407 (Mo. 2011) (adding Mo. Rev. Stat. § 379.108), effective August 28, 2011, requires certificates of insurance to be filed with the Director and that such forms contain the following or similar statement:

"This certificate of insurance is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend, or alter the coverage, terms, exclusions and conditions afforded by the policies referenced herein."

ACORD and ISO forms are deemed in compliance when they are filed with the Director. Persons are prohibited from requesting or issuing a certificate of insurance that contains false or misleading information concerning insurance coverage. The new law also prohibits references to contracts other than the contract of insurance in certificates of insurance and sets forth rights concerning notices of cancellation, nonrenewal, or any material change to the policy as it relates to certificates of insurance. Producers are permitted to charge a reasonable fee for issuing a certificate of insurance.

New Hampshire. Effective January 1, 2011, H.B. 419 (N.H. 2011) (adding N.H. Rev. Stat. § 412:6-b) prohibits persons from issuing certificates of insurance that are misleading, deceptive, or encourages misrepresentation, in addition to other similar prohibitions. Certificates of insurance are required to include the following statement, in a sufficient font and size and be readily identifiable:

"This certificate of insurance is issued as a matter of information only and confers no rights

upon the certificate holder. This certificate does not amend, extend, or alter the coverage, terms, exclusions, and conditions afforded by the policy or policies referenced herein."

Persons may not require or prepare false or misleading certificates of insurance or reference contracts other than the policy in the certificate of insurance. The newly enacted law also sets forth that persons are only entitled to notice or nonrenewal or cancellation if named in the policy as an additional insured. Insurance producers may charge a reasonable fee for providing a certificate.

New Jersey. Bulletin 11-04, issued in late February 2011, reminds producers that certificates of insurance, while not filed with the New Jersey Department of Banking and Insurance, should be used only to provide evidence of insurance in lieu of a copy of the actual policy, and cannot be used to amend, expand, or alter its terms.

New Mexico. In mid-January 2011, the New Mexico Insurance Division issued Bulletin 2011-001, which reminds insurers that certificates of insurance are required to be filed with and approved by the Division and that use of certificates that obscure or misrepresent coverage is a violation of the New Mexico insurance laws. The Bulletin sets forth guidelines that insurers and producers should follow, which are similar to several of the states' legislative efforts. One such guideline requires that each certificate of insurance contain certain language and that form requirements may be satisfied by using ACORD or ISO forms.

North Dakota. The North Dakota Legislature enacted S.B. 2062 (N.D. 2011) (adding a new Chapter 39.1 to Title 26.1 of the N.D. Cent. Code, N.D. Cent. Code § 26.1-39.1-01 et seq.), effective August 1, 2011, which requires filing and approval of certificates of insurance. Forms must contain the following or a similar statement:

"This certificate of insurance is issued as a matter of information only and confers no rights upon the certificate holder. This certificate of insurance does not amend, extend, or alter the coverage, terms, exclusions, or conditions afforded by the policies referenced in this certificate of insurance."

The new law also addresses the limitations on the use of certificates of insurance, prohibition on warranties, and the only circumstance under which a certificate holder is entitled to notice of cancellation, nonrenewal, or any material change regarding the policy.

Oklahoma. Effective November 1, 2011, S.B. 778 (Okla. 2011) (adding Okla. Stat. tit. 36, § 3640), requires certificates of insurance to be filed with and approved by the Insurance Commissioner. Forms may be disapproved if they are unfair or deceptive, among other similar reasons. Forms are required to include the following or similar statement:

"This certificate of insurance is issued as a matter of information only and confers no rights upon the certificate holder. This certificate of insurance does not amend, extend, or alter the coverage, terms, exclusions, or conditions afforded by the policies referenced herein."

Standard ACORD and ISO forms are deemed approved and not required to be filed if they otherwise comply with the new law's requirements. The new law also sets forth the limitations on the use of certificates of insurance, certain exceptions, prohibitions on referencing other contracts, and the only circumstance under which a certificate holder is entitled to notice of cancellation, nonrenewal, or any material change. Insurance producers who are not associated with an insurer's captive distribution system may charge a reasonable fee for preparing certificates.

Rhode Island. Issued in early March 2011, Bulletin 2011-01's stated purpose is to establish that the improper modification of certificates of insurance is an unacceptable business practice. It provides that certificates of insurance are not filed with the Insurance Division and cannot be used to amend, expand, or alter the terms of the underlying insurance policy.

Texas. Effective September 1, 2011, S.B. 425 (Tex. 2011) (adding Tex. Ins. Code § 1811.001 *et seq.*) is similar to legislation enacted in the above states. It provides for limitations on the use of certificates of insurance, certain exceptions, requires filing and approval of certificates, permits charging a filing fee, requires certain language, and provides for the legal right of notice of cancellation, nonrenewal, or any material change, as well as other provisions.

Utah. Utah's H.B. 79 (Utah 2011) (adding Utah Code § 31A-22-1701) applicable to certificates of insurance issued on or after May 10, 2011 requires certificates of insurance to be filed with the Commissioner and prohibits the use of unfair, misleading, and deceptive forms. Forms filed by nationally recognized insurance rating organizations are considered filed for use. The new law also addresses a certificate holder's limited right to receive notice of cancellation, nonrenewal, or a material change.

Virginia. Issued in late April 2011, Administrative Letter 2011-02 explains that the Utah Bureau of Insurance is aware of a widespread misunderstanding concerning certificates of insurance. The letter reviews the purpose of certificates of insurance and explains that they cannot be used to amend, expand, or alter the terms of the insurance policy. It also discusses a person's right to notice of cancellation of a policy.

III. Consolidation of the New York Insurance Department and Banking Department

In 2011, New York Governor Andrew Cuomo signed into law the Financial Services Law (Part A of S.2812-C/A.4012-C codified as Chapter 62 of the Laws of 2011), which consolidated the New York Insurance Department and Banking Department into a new department, among other things. Official on October 3, 2011, the New York State Department of Financial Services was created by transferring the functions of the Banking Department and the Insurance Department into a new department.

The Department of Financial Services is currently overseen by Superintendent Ben Lawsky appointed by Governor Cuomo. James Wrynn, who was the former Superintendent of the Insurance Department, serves as the Deputy Superintendent of the Financial Services Department.

The new Department of Financial Services is responsible for some unique undertakings, such as captive legislation and the Holocaust Claim Processing Office ("HCPO"). Another initiative includes the creation of the Financial Frauds and Consumer Protection Division ("FFCPD") which protects and educates consumers on financial products and services and fights financial fraud. The stated purpose of the consolidation is to modernize regulation by allowing the new agency to oversee a broader array of financial products and services, rather than a limited form of regulation.

IV. Extension of National Flood Insurance Program

In theory, extending the National Flood Insurance Program ("NFIP") could be a big topic

every year as the industry is left wondering each year whether the NFIP will lapse or be extended. With an expiration date of December 16, 2011, President Obama signed a continuing resolution on December 17, 2011 that bought the NFIP a week of funding. On December 23, 2011, the President signed the Consolidated Appropriations Act, 2012 (H.R. 2055) which included, among other provisions, an extension of the NFIP until May 31, 2012. During the 2011 Session, other bills were introduced, one in particular that would have funded the NFIP for five years while simultaneously reforming the NFIP's rate structure and mapping protocols.

V. Wisconsin Surplus Lines Form Filings

In *Edward E. Gillen Co. v. Insurance Company of the State of Pennsylvania*, 747 F. Supp. 2d 1058 (E.D. Wis. 2010), the court held that the defendant insurance companies could not enforce an arbitration clause in a surplus lines policy because the policy form was not filed with, and approved by, the Wisconsin Office of the Commissioner of Insurance ("OCI"). The court relied on Section 631.85, Wis. Stat., which, in part, provides that agreements to arbitrate in insurance policies are subject to review and approval of the OCI under Section 631.20, Wis. Stat.

The insurance companies argued that surplus lines insurance policy forms are not subject to review and approval pursuant to Section 618.41, Wis. Stat., which provides that the Commissioner may by rule subject policies written under Wisconsin's surplus lines statutes to regulation under Chapters 600 to 646 and 655. The Commissioner did not issue a regulation subjecting surplus lines insurers to such a requirement and historically has not accepted policy forms for review and approval. However, the court rejected the insurance companies' argument and held that Chapters 631 and 632 apply to all insurance policies; therefore, surplus lines policies not being exempted from Chapter 631 must be filed for review and approval by the OCI.

Subsequent to the court's ruling, the OCI issued a bulletin to all surplus lines insurers acknowledging the decision of the *Gillen* case and further confirming that the OCI does not consider surplus lines policy forms to be subject to their review and approval. Cases such as the *Gillen* case have been decided in several other states. For example, in *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Company*, 291 Fed. Appx. 220, 225, 2008 U.S. App. LEXIS 17686, at *12 (11th Cir. 2008), the Eleventh Circuit Court of Appeal relied upon the Supreme Court of Florida decision, *Essex Insurance Company v. Zota*, 985 So. 2d 1036 (Fla. 2008), to hold that Florida's policy form filing statute, Section 627.410, Fla. Stat., applies to surplus lines insurers. Legislation has since been passed in Florida to remedy the effect of these decisions.

VI. Florida's Sinkhole Legislation

In December 2010, the Senate Banking and Insurance Committee published its interim report on sinkhole insurance (*Issues Relating to Sinkhole Insurance*, Interim Report 2011-104). The report contained certain findings along with policy options for lawmakers and stakeholders to consider. Signed into law on May 17, 2011, CS/CS/CS/SB 408 contains many of the policy options suggested in the report.

Sinkhole insurance claims have increased substantially in Florida both in number and cost over the past two decades and, most dramatically, over the last several years, despite the fact that licensed geologists say there is no geological explanation for the significant increase in sinkhole claims being reported to insurers. The sinkhole claims frequency ratio for Citizens Property Insurance Company ("Citizens"), Florida's government-owned, insurer

of last resort, more than doubled between 2006 and 2009. In 2009, Citizens incurred over $84 million in sinkhole losses plus adjustment expenses, yet reviewed only $19.6 million in earned premium to cover those costs. Private insurers have also seen their sinkhole claims and costs rise by double and triple-digit percentages over the past several years.

With respect to general sinkhole issues, SB 408 amended Section 627.706, Fla. Stat. to provide that insurers may require a property inspection before issuance of sinkhole loss coverage. The new law allows insurers to restrict catastrophic ground cover collapse and sinkhole loss coverage to the principal building, as defined in the applicable policy. In addition, several definitions were revised, including, "catastrophic ground cover collapse," "sinkhole loss," and "sinkhole activity" to specifically refer to the "covered" building. Definitions were included for "neutral evaluation" and "neutral evaluator," and revises definitions of "professional engineer" and "professional geologist."

The new law now requires notice of initial, supplemental, and reopened claims under an insurance policy providing sinkhole coverage to be given to the insurer within two years after the policyholder knew or reasonably should have known about the sinkhole loss. Concerning investigation of sinkhole claims, SB 408 amended Section 627.707, Fla. Stat., to conform to new provisions regarding structural damage to a covered building. It provides that, if the insurer denies the claim without performing testing, the policyholder may demand testing within 60 days after receipt of the denial. If so demanded, the policyholder must pay 50% of the actual costs of the analyses and services or $2,500, whichever is less. The insurer must reimburse the policyholder for the costs if the insurer's engineer or geologist provides written certification that there is sinkhole loss.

If a covered building suffers a sinkhole loss or a catastrophic ground cover collapse, the insured must repair such damage or loss in accordance with the insurer's professional engineer's recommended repairs. However, if the insurer's professional engineer determines that the repair cannot be completed within policy limits, the insurer must pay to complete the repairs recommended by the insurer's professional engineer or tender the policy limits to the policyholder. The new law requires the policyholder to enter into a contract for the performance of building stabilization and foundation repairs within 90 days after the insurer confirms coverage for the sinkhole loss. This time period is tolled if either party invokes the neutral evaluation process, and begins again 10 days after the conclusion of the neutral evaluation process. Stabilization and all other repairs to the structure and contents are required to be completed within 12 months after entering into the contract for repairs unless there is mutual agreement, the neutral evaluation process is invoked, the claim is being litigated, or the claim is under appraisal or mediation.

Other provisions include, the prohibition of the policyholder from accepting a rebate from any person performing the repairs specified. If a policyholder receives a rebate, coverage is void and the policyholder must refund the amount of the rebate to the insurer. Persons who offer rebates commit insurance fraud punishable as a third degree felony. Also, an insurer may not renew a policy of property insurance on the basis of a sinkhole claim if the insurer paid full policy limits on the claim.

SB 408 enacted several other provisions of law related to sinkholes as well as general insurance related matters.

VII. Patient Protection and Affordable Care Act ("PPACA")

Signed into law on March 23, 2010, the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), is expansive health care reform

legislation that has made, and will make, sweeping changes to the U.S. health care system. The law reforms many aspects of the public and private health care industries. The PPACA contains numerous provisions which began taking effect in early 2010. The following is brief summary of some important provisions:

- Requirement to have qualifying health coverage;
- Extended dependent coverage for adult children up to age 26;
- Restrictions on annual benefit limits and elimination of lifetime limits;
- Health insurance exchanges;
- Elimination of pre-existing condition exclusions for children;
- Prohibitions on rescission of health care coverage;
- Limits on reimbursing over-the-counter medications; and
- Compliance with nondiscrimination rules for fully insured plans.

As in 2010, in 2011 many states enacted legislation implementing the PPACA. The following is a list of 2011 state legislation enacted in response to the PPACA:

Alabama. H.B. 60

Arkansas. S.B. 65, S.B. 838, H.B. 1226, H.B. 1315, H.B. 1428

Arizona. S.B. 1001a, S.N. 1619, H.B. 2016

California. A.B. 16a, S.B. 20, A.B. 36, S.B. 51, S.B. 87, A.B. 97, S.B. 136, S.B. 146, A.B. 152, A.B. 210, S.B. 222, A.B. 242, A.B. 574, A.B. 922, S.B. 946, A.B. 1066, A.B. 1296

Colorado. S.B. 128, S.B. 200, H.B. 1144, H.B. 1281

Connecticut. S.B. 921, S.B. 240, H.B. 6308, H.B. 6618

Delaware. S.B. 35, S.B. 56, S.B. 98, H.B. 160, H.B. 161

Florida. H.B. 97, H.B. 1193

Georgia. S.B. 17, S.B. 47, S.B. 77, H.B. 78, H.B. 461

Hawaii. H.B. 1134, S.B. 1273, S.B. 1274, S.B. 1348

Idaho. H.B. 323, S.B. 1115

Illinois. H.B. 103, H.B. 1152, H.B. 1555, H.B. 2982

Indiana. S.B. 461, H.B. 1001, H.B. 1210

Iowa. H.B. 45, S.B. 525, H.B. 597, H.B. 649

Kansas. E.R.O. 38, H.B. 2014, H.B. 2075, H.B. 2182

Kentucky. H.B. 1a, H.B. 255, H.B. 264

Louisiana. S.B. 154

Maine. H.B. 86, H.B. 778, H.B. 979, H.B. 1140, H.B. 1165

Maryland. H.B. 72, H.B. 166, H.B. 170, S.B. 182, S.B. 183, H.B. 450, S.B. 514, S.B. 723, H.B. 784

Massachusetts. H.B. 3318

Michigan. S.B. 348, H.B. 4526

Minnesota. H.B. 25a, H.B. 79, S.B. 1045

Mississippi. H.B. 377, H.B. 1514, S.B. 2220

Missouri. H.B. 10, H.B. 45, H.B. 423

Montana. H.B. 53, S.B. 125

Nebraska. L.B. 22, L.B. 73

Nevada. A.B. 74, A.B. 80, S.B. 440, S.B. 485

New Jersey. S.B. 4000

New Hampshire. S.B. 148, H.B. 601

New Mexico. S.B. 14, S.B. 208

New York. S.B. 2800, S.B. 2803, S.B. 2809, S.B. 5800

North Carolina. H.B. 22, H.B. 200, S.B. 323, S.B. 496, H.B. 578

North Dakota. H.B. 1125, H.B. 1126, H.B. 1127, H.B. 1165, H.B. 1252, H.B. 1386, H.B. 1475a, S.B. 2010, S.B. 2237, S.B. 2309

Ohio. H.B. 153, H.B. 218

Oklahoma. S.B. 547, S.B. 563, S.B. 722, H.B. 1554

Oregon. S.B. 88, S.B. 89, S.B. 91, S.B. 99, S.B. 104, S.B. 301, S. B.353, H.B. 2543

Rhode Island. S.B. 107, S.B. 301, H.B. 5618, H.B. 5894

South Carolina. H.B. 3700

South Dakota. S.B. 43

Tennessee. S.B. 79, S.B. 484, S.B. 1119, S.B. 1539

Texas. S.B. 7a, H.B. 438

Utah. H.B. 18, H.B. 19, H.B. 128, H.B. 174, H.B. 354, H.B. 404, H.B. 2003b

Vermont. H.B. 65, S.B. 104, H.B. 202, H.B. 438, H.B. 441

Virginia. S.B. 1062, H.B. 1500, H.B. 1928, H.B. 1958, H.B. 2434

Washington. H.B. 1087, H.B. 1220, H.B. 1544, H.B. 1738, S.B. 5122, S.B. 5371, S.B. 5445, S.B. 5596

West Virginia. S.B. 408, H.B. 2693

Wisconsin. S.B. 2a, A.B. 11a, A.B. 40

Wyoming. H.B. 50, S.B. 50, S.B. 102

VIII. Regulation of Surplus Lines Insurance Taxes and Placements

Signed into law on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") was considered to be historic legislation intended to facilitate the most across-the-board changes to financial services regulation since the Great Depression. Pub. L. No. 111-203. The surplus lines insurance industry's particular focus is on the Nonadmitted and Reinsurance Reform Act ("NRRA"), which was enacted as part of the Dodd-Frank Act to create uniform standards for the taxation and regulation of surplus lines placements and to provide for other industry economies, such as uniformity of broker licensure, surplus lines insurer eligibility and the purchase of coverage by large commercial entities. Codified at 15 U.S.C. § 8201 *et seq*. Most of the provisions of the NRRA became effective on July 21, 2011, one year after the enactment of the Dodd-Frank Act.

In general, the NRRA sets forth the standards for the collection and allocation of surplus lines premium tax and the regulation of surplus lines insurance placements. *See id.* Except as otherwise provided, the placement of nonadmitted insurance is subject to the statutory and regulatory requirements of only the insured's home state. 15 U.S.C. § 8202. Essentially, no other state can collect surplus lines taxes or otherwise regulate a surplus lines placement except for the home state. 15 U.S.C. §§ 8201–8202.

The NRRA defines the home state to mean, in the case of an individual insured, the state of that individual's principal residence. 15 U.S.C. § 8206. For an entity, the home state is the state in which the insured maintains its principal place of business. *Id.* For either an individual or entity, if 100% of the insured's risk is not located in the identified state, the home state is the state with the greatest percentage of the insured's taxable premium allocated to it under the policy. *Id.* For placements involving an affiliated group of companies, the home state would be the principal place of business of the member of the group with the largest percentage of premium under the surplus lines contract. *Id.*

Under the provisions of the NRRA, no state, other than the home state of the insured, may require any premium tax payment for nonadmitted insurance. 15 U.S.C. § 8201. The Act further provides that the states may enter into a compact or otherwise establish procedures to allocate the premium taxes paid to an insured's home state among themselves. *Id.* While Congress did not set forth the specific parameters for the compact or other uniform procedures, it did memorialize its intent that each state adopt nationwide uniform requirements, forms and procedures for the reporting, payment, collection and allocation of premium taxes for nonadmitted insurance. *Id.* Ultimately, the industry developed two competing standards that states could adopt to provide for the allocation, reporting, payment, and collection of premium tax and other uniform regulation of multi-state surplus lines placements — the Nonadmitted Insurance Multi-State Agreement ("NIMA") developed by the National Association of Insurance Commissioners ("NAIC"), and SLIMPACT, sponsored by National Conference of Insurance Legislators ("NCOIL").

In addition, the insured's home state is the only state that may require licensure of a surplus lines broker in order to sell, solicit, or negotiate the nonadmitted contract. 15 U.S.C. § 8202. With the exception of workers' compensation, any law, regulation, or action of any state applicable to nonadmitted insurance, other than the home state, shall be preempted and may not be enforced by that state. *Id.*

As of July 21, 2012, a state may not collect any fees related to the licensing of an individual or an entity as a surplus lines broker unless that state participates in the NAIC's national insurance producer database, or another equivalent uniform national database for the licensure of surplus lines brokers and the renewal of their licenses. 15 U.S.C. § 8203.

Further, the NRRA prohibits each state from imposing eligibility requirements on nonadmitted U.S. insurers except in conformity with certain provisions of the NAIC's Non-Admitted Insurance Model Act, unless the state has adopted certain nationwide uniform requirements, forms, and procedures in accordance with the NRRA. 15 U.S.C. § 8204. The only requirements that may be imposed by a state that has not adopted nationwide uniform procedures relates to authorization requirements to write types of insurance and to capital and surplus requirements. *Id.* Also, a state may not prohibit a broker from placing nonadmitted insurance with an alien surplus lines insurer that is listed on the NAIC International Insurers Department's Quarterly Listing of Alien Insurers. *Id.*

Finally, surplus lines brokers seeking to procure nonadmitted insurance for an exempt commercial purchaser would not need to satisfy any state requirement to make a diligent search for such insurance from an admitted carrier as long as the broker discloses that insurance may or may not be available in the admitted market with greater protection and more regulatory oversight, and the exempt commercial purchaser has subsequently requested in writing that the broker procure the insurance from a nonadmitted insurer. 15 U.S.C. § 8205.

The following is a list of legislation enacted in 2011 in response to the NRRA and notes whether a state has been reported to have adopted NIMA or SLIMPACT:

Alabama. H.B. 76 – SLIMPACT

Alaska. H.B. 164 – NIMA

Arizona. H.B. 2112

Arkansas. H.B. 2143

California. A.B. 315

Connecticut. H.B. 6652 – NIMA

Florida. S.B. 1816 – NIMA

Georgia. C.S./H.B. 413

Hawaii. H.B. 1052 – NIMA

Idaho. H.B. 179

Illinois. Company Bulletin 2011-09.

Indiana. S.B. 0578 – SLIMPACT

Kansas. H.B. 2076 – SLIMPACT

Kentucky. H.B. 167 – SLIMPACT

Louisiana. H.B. 469 – NIMA

Maine. H.P. 993

Maryland. S.B. 694, H.B. 959

Massachusetts. H.B. 3535

Minnesota. S.F. 1045

Mississippi. H.B. 785 – NIMA

Missouri. S.B. 132

Montana. S.B. 331

Nebraska. L.N. 70 – NIMA

Nevada. S.B. 289 – NIMA

New Hampshire. H.B. 424

New Mexico. S.B. 250 – SLIMPACT

New York. S.B. 2811/A. 4011

North Carolina. S.B. 321

North Dakota. H.B. 1123

Ohio. H.B. 122

Oklahoma. S.B. 778, H.B. 2072

Oregon. H.B. 2679

Pennsylvania. S.B. 1096, S.B. 1097

Puerto Rico. NIMA

Rhode Island. H.B. 5110/S.B. 88, H.B. 5953/S.B. 758

South Dakota. H.B. 1030 – NIMA

Tennessee. H.B. 966 – SLIMPACT

Texas. S.B. 1

Utah. H.B. 316 – NIMA

Vermont. S.B. 36 – SLIMPACT

Virginia. H.B. 2286, S.B. 1124

Washington. H.B. 1694

West Virginia. S.B. 435

Wyoming. H.B. 242 – NIMA

IX. Unclaimed Property

Compliance with unclaimed property laws has been the topic of discussion for a couple of years, but most of the action took place in 2011. In response to several audits performed on insurance companies, mainly life insurance companies, regulators questioned whether insurance companies were diligently trying to locate the holders of abandoned property or turning over the property once efforts failed. The National Association of Insurance Commissioners ("NAIC") has formed a special task force to coordinate and facilitate a formal examination of these purported practices. The task force includes insurance commissioners from California, Florida (chair), Illinois, Iowa, Louisiana, New Hampshire, New Jersey, North Dakota, Pennsylvania, and West Virginia.

In late November 2011, the National Conference of State Legislators ("NCOIL") approved a model law titled Model Unclaimed Life Insurance Benefits Act in an effort to remedy some of these concerns. In general, the Model Act requires insurers to compare in force life insurance policies and retained asset accounts with the U.S. Social Security Death Master File ("DMF") to identify any potential matches. It also requires insurers to confirm an insured or account holder's death, locate any beneficiaries, and provide claims forms and instructions. The thought behind the Model Act is that by using the DMF, death benefits would be more effectively disposed of, whether to the beneficiaries or the state, rather than keeping the proceeds in limbo.

The New York Insurance Department sent a "308 Letter" to all licensed life insurers, which requires life insurers to determine if benefit payments are due, locate and make payments to beneficiaries, and submit a report to the Department. New York is also considering amending its unfair claims practices regulations to require life insurers to perform regular DMF searches.

Certain industry stakeholders have expressed opposition to the Model Act in that it adds another level of compliance that insurers must follow. In addition, some industry members have stated that unclaimed property laws sufficiently facilitate the reporting and remitting of unclaimed property. In any event, many interested parties have come together to further explore the claims settlement practices of life insurance companies.

X. Commissioners

The year 2011 proved to be quite a year for new insurance commissioners, former commissioners retaking positions, and re-elections. The following is a brief summary of some of the changes:

Colorado. In early July 2011, Governor John Hickenlooper named Jim Riesberg as Colorado's new Insurance Commissioner. Commissioner Riesberg replaced John Postolowski, who was appointed as nterim Commissioner in December 2010.

Connecticut. Thomas Leonardi was appointed by Governor Dannel Malloy in February 2011 to serve as Insurance Commissioner. Before the appointment, Barbara Spear served as Acting Commissioner since the recent resignation of Thomas Sullivan.

District of Columbia. William White was appointed Insurance Commissioner by Mayor Vincent Gray on February 4, 2011, pending confirmation by the Council of the District of Columbia, which was unanimously confirmed on June 7, 2011.

Illinois. In October 2011, the Governor Pat Quinn appointed Andrew Stolfi as Acting Director. Previously, in June 2011, Governor Quinn named Jack Messmore as Acting Director of the Illinois Department of Insurance, filling the vacancy created when former Director Michael McRaith stepped down to become the first Director of the Federal Insurance Office.

Louisiana. On October 22, 2011, Commissioner Jim Donelon was re-elected to his post as Insurance Commissioner, an office he has held since 2006. Commissioner Donelon currently serves as the National Association of Insurance Commissioners' ("NAIC") Vice-President for 2011.

Maine. Governor Paul LePage named Eric Cioppa as the State's Acting Insurance Superintendent on June 1, 2011. He was confirmed as Superintendent by the Maine Senate on September 27, 2011. Superintendent Cioppa replaced former Superintendent Mila Kofman who resigned from the post.

Maryland. Governor Martin O'Malley appointed Therese Goldsmith as the new Commissioner of the Maryland Insurance Administration, effective June 13, 2011. Commissioner Goldsmith replaced Beth Sammis, who held the position on an interim basis for more than a year.

Michigan. Kevin Clinton was named the new Commissioner of the Michigan Office of Financial and Insurance Regulation by Governor Rick Snyder effective April 16, 2011. Commissioner Clinton assumed the role left open upon Ken Ross leaving.

Minnesota. In early 2011, Governor Mark Dayton appointed Mike Rothman to serve as Commissioner of the Minnesota Department of Commerce.

Mississippi. With more than 60 percent of the vote, Mississippi Insurance Commissioner Mike Chaney won re-election as Mississippi's Insurance Commissioner. Commissioner Chaney was first elected to the post in 2007, after serving seven years in the state House of Representatives and eight years in the state Senate.

Nevada. Commissioner Scott Kipper was re-appointed Nevada Commissioner of Insurance on October 24, 2011 by Business and Industry Director Terry Johnson. He previously served as Commissioner from December 2008 to June 2010. After leaving in 2010, he served as the Deputy Commissioner of the Office of Health Insurance and as CEO of the State of Louisiana Office of Group Benefits.

New York. As the first person to head New York's newly established Financial Services Department, Ben Lawsky was appointed as Superintendent by Governor Andrew Cuomo.

Ohio. Director Mary Taylor was sworn in as Ohio's Lieutenant Governor on January 10, 2011, which is the same day Governor John Kasich named her to serve as the Director of the Ohio Department of Insurance.

Oregon. As a result of former Administrator Theresa Miller's acceptance of a position with the federal Center for Consumer Information and Insurance Oversight, which is the federal agency charged with implementing many of the provisions of the Patient Protection and Affordable Care Act in the state, Louis Savage was appointed Acting Administrator.

Pennsylvania. Michael Consedine was appointed by Governor Tom Corbett to serve as Insurance Commissioner for the Pennsylvania Insurance Department, and confirmed by the Senate on April 26, 2011. Commissioner Consedine was nominated to replace Joel Ario, who served for three years and left to take a position with the federal government establishing health exchanges mandated under the federal health reform law.

South Carolina. David Black was appointed as the Director of the South Carolina Department of Insurance by Governor Nikki Haley on January 20, 2011. Director Black replaced former Director Scott Richardson. However, at the close of 2011 Director Black resigned unexpectedly. Governor Haley named Gwen Fuller-McGriff as Acting Director of the Department. Director Fuller-McGriff has been serving as the Department's Director of Legal, Legislative, and External Affairs.

Tennessee. In early 2011, then Governor-elect Bill Haslam appointed Julie McPeak as Commissioner of the Tennessee Department of Commerce and Insurance, who previously served as the Executive Director of the Kentucky Office of Insurance. Commissioner McPeak succeeded former Commissioner Leslie Newman.

Texas. On July 20, 2011 Governor Rick Perry appointed Eleanor Kitzman to lead the Texas Department of Insurance. Commissioner Kitzman previously served as Commissioner of the South Carolina Department of Insurance, but left in 2007. Commissioner Kitzman replaced Mike Geeslin, who announced in January that he was stepping down as Texas Insurance Commissioner.

Vermont. In late 2010, Governed Peter Shumlin chose Steve Kimbell to be the state's next Commissioner of Banking, Insurance, Securities and Health Care Administration. Commissioner Kimbell assumed the role on January 7, 2011.

West Virginia. Governor Earl Ray Tomblin appointed Michael Riley as Acting Insurance Commissioner of the West Virginia Offices of the Insurance Commission effective July 1, 2011. Former Commissioner Jane Cline retired on June 30th.

Wisconsin. In early 2011, Governor Scott Walker appointed Ted Nickel as Commissioner of Insurance and Dan Schwartzer as Deputy Commissioner. Commissioner Nickel replaced former Commissioner Sean Dilweg.

PDF LINK: Click here for enhanced PDF of this Emerging Issues Analysis at no additional charge

RELATED CONTENT: Click here for more Emerging Issues Analysis related to this Area of Law

ABOUT THE AUTHOR(S):

Fred E. Karlinsky, Esq., a shareholder of Colodny, Fass, Talenfeld, Karlinsky & Abate, practices in the areas of insurance regulatory law, transactional law and governmental affairs. Mr. Karlinsky represents both foreign and domestic insurers and reinsurers throughout the United States and internationally in all elements of the insurance and reinsurance business. He advises clients on operational issues including start-up activities, structuring and financing, vendor relationships and a complete array of regulatory issues including licensure, compliance, expansion, solvency, rate and form filings and financial and market conduct examinations.

Mr. Karlinsky speaks on insurance legislative and regulatory matters at national, international and corporate insurance conferences, and frequently authors insurance-related articles for national publications, including the Federation of Regulatory Council Journal and the American Bar Association Tort Trial and Insurance Practice Law Journal. He attends all meetings of the National Association of Insurance Commissioners, National Conference of Insurance Legislators and Southeastern Regulators Association throughout the year.

Rated "AV" by Martindale-Hubbell, Mr. Karlinsky was listed among the top Florida insurance lawyers in Chambers USA 2011 and has been named over the course of multiple years to Florida Trend Magazine's Legal Elite, the Top Lawyers Section of South Florida Legal Guide, and as a Florida Super Lawyer. He is the Florida lobbyist for the Property and Casualty Insurers Association of America and lead lobbyist and General Counsel to the Florida Property and Casualty Association.

Mr. Karlinsky is currently a Fellow of the American Bar Foundation, an honor limited to one-third of one percent of attorneys in America, and is a member of the American Association of Managing General Agents, the Association of Insurance Compliance Professionals, the Federation of Regulatory Counsel, the International Association of Insurance Professionals, the International Association of Insurance Receivers, the National Association of Professional Surplus Lines Offices, the Society of Financial Examiners, the Surplus Lines Law Group and the Industry Education Council of the National Conference of Insurance Legislators, among other national professional organizations.

In 2011, Mr. Karlinsky was appointed to Florida's Seventeenth Circuit Judicial Nominating Commission by Governor Rick Scott. He also was recently admitted to the Roll of Solicitors of the Senior Courts of England and Wales.

Mr. Karlinsky serves as an Adjunct Professor of Law at the Florida State University College of Law, where he teaches a course he helped to create, titled "Insurance Law: A Law and Economics Perspective." In 2011, he was appointed to the Florida State University Foundation Board of Trustees.

Mr. Karlinsky can be reached at fkarlinsky@cftlaw.com or +1 954 332 1749.

Richard J. Fidei, Esq., a partner at the law firm of Colodny, Fass, Talenfeld, Karlinsky & Abate, represents insurance and reinsurance companies, brokers and other related entities in a broad spectrum of regulatory, transactional and corporate matters, as well as in claim and dispute resolution proceedings.

A member of the Florida and Pennsylvania Bars, he also represents health maintenance organizations, managing general agencies, brokers, premium finance companies, third-party administrators, claims companies and other insurance-related entities in connection with regulatory, compliance, administrative and transactional issues.

Mr. **Fidei** serves as national General Counsel to the Association of Insurance Compliance Professionals ("AICP") and as President of the AICP Gulf States Chapter. He is also is a member of the Federation of Regulatory Counsel, the American Association of Managing General Agents and the International Association of Insurance Receivers.

An experienced legal instructor and lecturer who has been certified by the American Bankers Association, Mr. **Fidei** prepares and delivers insurance and reinsurance presentations nationwide.

Mr. **Fidei** can be contacted at rfidei@cftlaw.com or +1 954 332 1758.

Elizabeth M. Fohl, Esq., an associate at the law firm of Colodny, Fass, Talenfeld, Karlinsky & Abate, practices in the areas of insurance regulatory and compliance law, commercial transactions and corporate matters.

Her practice includes the acquisition, expansion and financing activities of insurers and insurance related entities and counseling clients on a variety of regulatory compliance issues, including financial and market conduct examinations, holding company reports and filings, rate and form filings and solvency issues. Ms. Fohl also handles complex commercial transactions as well as general business entities matters.

Ms. Fohl can be reached at efohl@cftlaw.com or +1 954 332 1741.