

Q&A With Faegre Baker's Scott Kosnoff

Law360, New York (April 22, 2013, 3:05 PM ET) -- Scott Kosnoff with Faegre Baker Daniels LLP is an insurance regulatory, transactional and public policy lawyer. He advises insurers and regulators on mergers and acquisitions, reinsurance transactions, risk transfer arrangements between health insurers and providers, holding company and corporate governance issues, troubled company and insolvency matters, unclaimed property issues and the Dodd-Frank Wall Street Reform and Consumer Protection Act. Kosnoff is a former chairman of the Federation of Regulatory Counsel and the American Bar Association's Insurance Regulation Committee.

Q: What is the most challenging case you have worked on and what made it challenging?

A: One project that stands out is our representation of the national insurance guarantee system in connection with financial regulatory reform following the economic meltdown in 2008. It was challenging, exciting and important.

The guarantee system was formed by state lawmakers and insurance regulators 40 years ago, and it protects insurance consumers when an insurance company fails. Our job was to educate Congress, the administration and key federal agencies about the guarantee system and how it works in the runup to the Dodd-Frank Wall Street Reform and Consumer Protection Act and during post-enactment rule-making and implementation.

Even though the guarantee system has an impressive track record, the AIG debacle left many in Washington wary of anything connected with state insurance regulation. (The guarantee system doesn't have a role in regulating insurers, but it is a creature of state law and works hand-in-hand with state-based receivers when insurers fail.)

Some federal officials were skeptical because the guarantee system isn't prefunded like the Federal Deposit Insurance Corp. (FDIC), and others even suggested that the FDIC be put in charge of insurance insolvencies. It didn't help that most people have never heard of the guarantee system, which does its job quietly without fanfare.

To help get the word out, we mapped out an extensive communications strategy with our clients. We briefed key members of the Senate Banking Committee and the House Financial Services Committee and met with officials at U.S. Department of Treasury, the FDIC and Federal Reserve. We also commented and provided technical assistance on a multitude of legislative proposals, coordinating our efforts with the National Association of Insurance Commissioners, insurance trade associations, individual insurers and public policy leaders in Washington.

Ultimately, Congress passed the Dodd-Frank Act, which creates a new mechanism for liquidating systemically important financial companies whose failure could destabilize the economy. While the FDIC will be appointed receiver of most of such companies, all insurers will remain subject to state receivership laws, and the guarantee system will continue to protect insurance consumers.

Of course, Dodd-Frank also established a Federal Insurance Office and tasked the office with studying the consequences of subjecting insurance companies to federal resolution, including what that would mean for the guarantee system. So, there's more work to be done.

Q: What aspects of your practice area are in need of reform and why?

A: State regulators deserve reasonably high marks for how the industry fared during the economic crisis. In addition, the NAIC's solvency modernization initiative makes sense, and recent changes to the holding company act are a solid improvement.

But all is not perfect. Market conduct exams remain costly and inefficient and lead to inconsistent results. In particular, the unclaimed property situation is a regulatory train wreck.

Moreover, states continue to have little incentive to achieve uniformity in the way they regulate the industry. Unnecessary (and sometimes senseless) state-by-state differences in the law continue to make doing business on a national basis cumbersome and too expensive. Regulators can't dictate to their legislatures what laws to pass, of course, but surely, we can do better.

There's no political appetite for a federal regulator, so we shouldn't waste time thinking about that as a possible fix. Instead, we should look for ways that the federal government can bring about positive change in state regulation as it has done on several occasions. Of course, passing federal legislation is no guarantee that the states will fall in line.

Q: What is an important issue or case relevant to your practice area and why?

A: It's hard to imagine a more important issue for health insurers than the changes required by the Affordable Care Act. The law is literally reshaping the health insurance industry, causing some players to gobble up physician practices or shift risk to accountable care organizations, while others focus on the expanding Medicaid program, and still, others shift their attention to less regulated industries.

Unclaimed property issues continue to plague the life insurance industry. I've already said enough about that.

Natural catastrophes and weather events are a big issue for property and casualty insurers (and for the rest of us). Some might call that an inconvenient truth.

The very largest insurers are worried about being designated systemically important by the new Financial Stability Oversight Council. They should be; the designation would subject a company to regulation by the Federal Reserve Board, which will be no small matter.

The Federal Insurance Office is charged with conducting a study and submitting a report to Congress on how to modernize and improve the system of insurance regulation in the United States. That study could be a big deal and might even fuel meaningful modernization — when it's released. (The study was due more than a year ago.) I've heard that the report will be released on the same day the federal government admits that aliens really did crash in Roswell, N.M., in 1947. But that's only a rumor.

Finally, there's plenty of action on the international regulatory front, primarily in response to the economic crisis. The Federal Insurance Office is heavily involved in that action. Some large insurers are concerned enough that they have designated personnel following the International Association of Insurance Supervisors and other international regulatory groups full time.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: I really enjoyed working with Pat Hughes on Dodd-Frank-related matters and the NAIC's effort to improve the state-based receivership system for insurers. (At the time, Pat ran the Illinois Office of the Special Deputy Receiver; he's since joined Alvarez & Marsal.) Pat is smart, practical, collaborative and politically savvy, and he really became an expert on the orderly liquidation provisions of Dodd-Frank. He has a great sense of humor and, most importantly, loves Star Trek.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Mistakes, I've made a few. For starters, I thought I wanted to be a litigator. Not a good idea. After two long (and miserable) years, Charlie Richardson and Dick Freije gave me a new lease on life with our insurance group. I learned I am much better suited to regulatory and transactional matters than to discovery and daily combat.

I love working with clients who respect the law, do the right thing, value the service we provide and come to see us as an extension of their team. I spent time early in my career trying to make every opportunity work and found life's too short to be challenged by people who see lawyers as a (barely) necessary evil.

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