

THE REGULATOR™

INSURANCE REGULATORY EXAMINERS SOCIETY

NAIC state survey

Market conduct exams by staff? By contractors? The states are split

by Scott Hooper

special to THE REGULATOR

More than half the states that conduct market conduct exams do so using only state employees, while the rest rely solely on contractors or use a combination of contractors and employees.

At least that was the case late last year, when the National Association of Insurance Commissioners conducted its first market conduct exam survey.

The NAIC's original idea wasn't to look at market conduct activity as such, although the survey ended up generating all manner of interesting data.

"Our thought was that this information would be helpful in assessing what the current status of employment of market conduct examiners was within the states," said John Mancini, NAIC's market affairs manager.

Since the one-time study showed wide variation in salary levels based on geography, experience and other factors, Mancini said it's unlikely the survey will be repeated.

Of the 41 states that responded, several didn't do market conduct exams at all, or at least not separate from financial exams. Of those that did separate market conduct exams, 19 used only employees, 9 used only contract examiners, and 8 used a combination of personnel.

Speaking of contractors, 8 of the 17 states using contractors of any form relied on individuals, while 3 hired firms to supply them with examiners. The remaining 6 states used a combination of the two.

Some insurance departments focus primarily on domestic companies, while others assign their people on the basis of line of insurance or perceived need.

The NAIC survey found that 11 states use their in-house examiners exclusively on domestics. Another 7 examine domestics, although not exclusively, while 14 states don't have their people look at domestics at all.

Three states — Illinois, South Carolina and Wisconsin — have their personnel look 100% of the time at foreign companies, while 9 other states' people spend 50-85% of their time on non-domestic companies. The majority, though (16 of the 28 responding to this question), don't

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Legal and regulatory news from the states! Check out our new feature, Regulator's Roundup — page 12

HELP WANTED

Ever sat through an insurance panel discussion or program and said to yourself, "I could have done this better"? Well, here's your chance to get involved and help organize some IRES programs.

It's easy. Just call or fax us and volunteer. Take charge and do it your way.

✓ Speakers for 1998 spring NAIC/IRES "Regulating the Marketplace" school — You will attend a one-day planning session in Kansas City some time in March and then spend anywhere from one to two days in KC during the actual school in April

✓ Program planners for August 1999 CDS in Las Vegas — Help plan programs find speakers

✓ Write guest article for THE REGULATOR — deadline is the 20th of the month.



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The Regulator™

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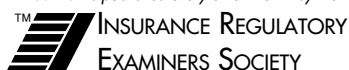
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President's Forum

Gary W. Meyer, CIE
IRES president

I would like to start these remarks with a "personal column" congratulations to Gary Domer of our Board of Directors who just recently tripped down the path of matrimony. Good luck to Gary and his new bride.

Board Members David Blair of Ohio and Ron Kotowski of Illinois, both longtime members of IRES, have recently resigned from the Board to take positions in industry. They will be missed.

John Mancini, Market Conduct Manager at the NAIC, another longtime IRES member and a very active participant at most of the CDS meetings, has also announced his resignation from the NAIC. John, following the advice of Horace Greeley, is headed West to Fireman's Fund where he will become the Market Conduct Director. Good luck to David, Ron and John in their new endeavors.

This is an easy segue to the issue of participation in IRES. Now is the time to consider running for the IRES Board of Directors. Nine present board members' terms expire next year. I will encourage all nine to re-run but we can't know what other career or life opportunity decisions they may have to make before making another four-year commitment to IRES.

The IRES committee on Ethics and Accreditation has been very busy. They are considering changes to the present curriculum. Some of these changes being considered include courses from the CIC program, the Insurance Institutes course on Insurance Regulation and possibly the new LOMA courses on regulatory compliance. I am sure that Jann Goodpaster, the committee chair, would appreciate any comments, not only from people who have taken these courses but comments regarding other courses that members would like to be considered.

I have heard from one member with suggestions for a workshop at the 1999 CDS. Now is the time for you to send in suggestions for topics you think would make good workshops. Similarly, if you would be interested in participating in a workshop, let us



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Accreditation Committee

By Jann Goodpaster, CIE

Chair, IRES Accreditation & Ethics Committee

The Accreditation & Ethics Committee had its first meeting of the new operating year on September 15, 1998. The committee established several goals for the 1998-1999 year. Among them were:

a) Further the recognition of the AIE and CIE designation. To accomplish this the committee is revising the recognition ceremony performed at the annual CDS. We have also initiated a program of sending letters of recognition to the Commissioner of the new designee and sending press releases to local newspapers.

b) Review the curriculum for the AIE and CIE designation.

c) Determine if the AIE or CIE accreditation system should be opened to persons who are not regulators.



Updates on these and other information will be in future issues of THE REGULATOR.

EFFECTIVE IMMEDIATELY: If you have not been a member of IRES for two years, you will be required to provide evidence of two years of regulatory experience when applying for the designation. This can be a letter from your immediate supervisor or personnel officer.

FREQUENTLY ASKED QUESTIONS

How long does it take to receive my designation after I have sent all the information to the IRES office?

Applications are first reviewed at the IRES office to determine if the applicant is a member in good standing. The applications are then forwarded by mail to the Accreditation chair who reviews the application and supporting materials. Completed applications with proper supporting information (see "EFFECTIVE IMMEDIATELY" for information on a change in supporting information required) are approved within a few days and the certificate and letter sent to the new

designee. This entire process usually takes 7 to 10 business days from the time it is received at the IRES office.

If there are questions or the supporting documentation is not clear, the process is usually delayed until additional information is obtained.

Will any of my excess hours from the first compliance period (Sept. 1, 1995 - Sept. 1, 1998) carry over to the new compliance period that started Sept. 1, 1998?

No.

Please contact the IRES continuing ed coordinator, Joy Moore, at the IRES offices for any other questions relating to the continuing ed rules.

President's Forum

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know. On the subject of IRES committees, the Chairs have been striving to place members who have expressed an interest on those committees. This is the time to get involved; if you have an interest in a specific committee and have not heard from that committee, please let me know.

At the 1998 CDS, the Al Greer Award was given to a general member for the first time. As you will recall, this award is to recognize exemplary work by a member of IRES in the performance of their duties. This award is intended for the "worker bee" who is not in a senior management capacity. Please look around; if someone you work with routinely does outstanding work, take the time to nominate them for this award. THE REGULATOR will provide additional information on requirements and procedures for nominating members for this award.

I would certainly be remiss if I didn't take this opportunity to say goodbye to my own boss, Jay Angoff, Director of the Missouri Department of Insurance, who is leaving the Department to seek even greater challenges.

NAIC survey on state market conduct examiners

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look at foreign companies at all.

AIE, CIE

The NAIC survey also found that about a third of the respondents rely on IRES certification, entirely or in part, to set pay classifications for their market conduct examiners.

About the same percentage said they compensate their examiners based on rates published in the NAIC's Market Conduct Examiners Handbook, although Missouri was the only state to indicate there's a statutory requirement to do so.

Interestingly, a large majority of the states said they thought NAIC should continue to publish compensation rates, if only for use as a guide or benchmark. (Of course, some states replied "Not relevant," "They are misleading" or "The NAIC has no business telling states what to pay in salaries.")

When asked what other occupations, within and outside of the insurance industry, they used to assess compensation, states presented quite a laundry list.

The most popular (although by only small margins) were auditors, underwriters, compliance specialists, attorneys, claims managers, underwriting managers, accountants/CPAs, insurance company management, policy forms supervisor, claims examiners, actuaries and adjusters.

Also mentioned were claims reps, federal examiners, public service reps, fraud investigators, utilization review analysts, investment specialists and report writing specialists.

As for per-diem reimbursement, responding departments were about evenly split, with the majority (21 of 36 responding to the question) using Continental United States Per Diem Rates (CONUS). The others said they used other methods, from collective bargaining to actual expenses, to legislative limitations on out-of-state travel — although several of them compare their rates to CONUS.

Separate units?

At the time the NAIC survey was conducted, nearly a year ago, 23 states had separate market conduct units; 15 were combined with financial.

Wherever it's housed, 9 states said the market conduct function reports to the commissioner or a deputy, 7 to financial examinations, 6 to a chief examiner, 4 to a director of market regulation, 3 to enforcement and 1 to legal.

Only two states said they don't use the NAIC Market Conduct Handbook during exams (and one of those two was planning to change that this year). Of the 15 using it primarily as a reference, at least one was planning to rely on it more in the future.

The majority of respondents said all market conduct examiners carry PCs with them on-site. The bulk of the remaining states either issue them only to examiners-in-charge or they rely on the company to provide hardware and software.

Although an overwhelming majority make use of RIRS, SAD, CDS or ETS, other

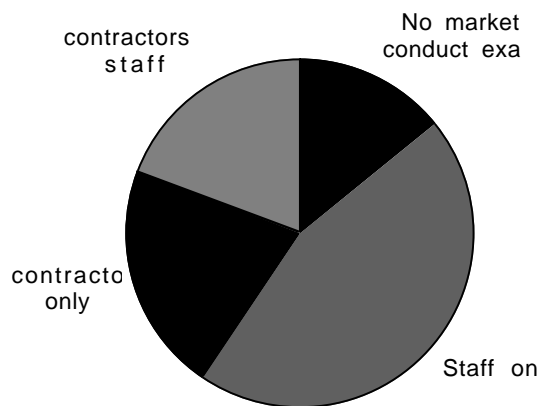
software use is all over the lot.

Excel was the most popular application, with 21 states using it, followed by Access (18), ACL (14), Word (13) Lotus (6) and Word Perfect (5). Another 14 apps — including Internet Explorer, Easytrieve, Quatro Pro and CC Mail — surfaced just once apiece (although we assume most of those respondents would rather go back to using a pencil than give up their favorite software).

Despite the widespread use of computers, only a quarter of the states said they had or were planning to get an automated exam specialist to support their market conduct examiners, either directly or through cooperation with the financial exam staff.

The survey was conducted in December 1997, and 41 states responded to the survey questionnaire. If you'd like your own copy, contact Shelley Goodman, 816-889-6881. ■

States and market conduct



A large number of states use contracts in total or in part for market conduct exams.

Source: NAIC

Mancini leaving NAIC

John Mancini, long-time market conduct coordinator for the National Association of Insurance Commissioners, has announced that he is leaving effective Nov. 1.

John will be taking a position as director of market conduct for the

Fireman's Fund Insurance Company in Novato, California. He will be responsible for overseeing the company's market conduct compliance.

It would be an understatement to note that IRES has relied heavily on John's support and encouragement over the years. He has spent many hours and days working on IRES, helping us with problems and challenges and taking part in our educational programs.

Best of luck, John, to you and Leslie and your family.



Al Greer Membership Award

Now is the time to think about fellow regulators and insurance department colleagues you'd like to nominate for the 1999 Al Greer Award.

The award recognizes career insurance regulators who have demonstrated overall professionalism, dedication and hard work in their service to their states and to insurance regulation in general.

Submit your nomination to: Paul Bicica, IRES Membership Chair, 130 N. Cherry, Suite 202, Olathe, Kansas 66061. The recipient will be announced at the 1999 IRES Career Development Seminar next August in Las Vegas.

C.E. News

Updates and other tidbits from the National IRES Continuing Education program, the CE program for persons holding AIE and CIE designations.

DID YOU MISS THE DEADLINE?

Designee holders who missed the Oct. 1 deadline for reporting required continuing education credits during the initial 3 year-45 hour compliance period which ended Sept. 1, 1998 will soon be receiving notices from the IRES CE Office that IRES will no longer recognize their designation.

To be automatically reinstated, designee holders must certify all past CE hours and pay a \$60.00 reinstatement fee. Those who filed a 60 day extension prior to Oct. 1 have until Dec. 1 to report their credits.

If insufficient CE was earned during the period Sept. 1, 1995 to Sept. 1, 1998, a written appeal for reinstatement must be made in writing to the Accreditation & Ethics Committee. (See page 11, NICE Manual, rev. 7/20/98)

NEXT DEADLINE IS OCT. 1, 1999

The new 15 hour annual program is now in effect. It began on Sept. 1, 1998 and ends Sept. 1, 1999. An extension of up to one year may be requested.

All credit for the current program must be earned in the current reporting year. **NO carry over of credits from the previous year's compliance period will apply.**

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How to avoid market conduct exam **PITFALLS**

By Donald P. Koch, CIE

A pitfall generally suggests an event or occurrence with negative connotations that is unanticipated or unexpected. Regulators and insurers do not care to operate in a manner that invites a pitfall. Yet the market conduct process seems to present them with substantial frequency. This occurrence suggests that greater attention needs to be applied to the identification and elimination of pitfalls.

The compliance interests of the regulator and the insurer frequently coincide. It is sad to note how infrequently this fact is recognized. The amount of fear and trepidation raised by a potential or actual market conduct examination is often counter-productive. The knowledge that a market conduct examination of an insurer has been called or is under consideration is sufficient to cause considerable distraction for Company management. This is in part based on reasonable concern about costs. The financial burden of an examination may be extraordinary. The costs fall into three general areas:

- The actual expense of conducting an examination that must be reimbursed to the state or its examiners.
- The cost to the company to respond to the needs of the examination.
- Any resultant fines, penalties or cost of remediation or restitution.

A pitfall can increase the costs in each of the three areas, particularly those resulting from fines and penalties. So how does one deal with this process and avoid the pitfalls? What can a company do to enhance its position when an examination is expected? What steps can a company take to be prepared for the eventuality or the reality of a market conduct examination? The answers differ from company to company, but the basic ingredients are similar. There may be better labels for the ingredients discussed here, but that is not important. It is important that these points be thoughtfully considered



Experiences

During my 27 years as a regulator, I have been involved in many areas in insurance regulation including filings, hearings, examination, the NAIC, legislative activities, training and administration. Each of these roles has resulted in considerable contact and sometimes conflict with the regulated industry.

Over time, certain attitudes and actions by those contacts were a clear signal that problems would be found when an examination occurred or a review was made. Many of the pitfalls that a company steps into are not particularly difficult to avoid.

Management

The critical first element in any scheme to develop preparedness and avoid examination pitfalls is ethical management. Ethical management is not a direct standard in the NAIC Market Conduct Examiners Handbook. It is usually not a direct requirement of the statutes regulating the business of insurance. It is, however, strongly inferred through the structure of those statutes. Most will condemn unethical behavior

Don Koch, CIE is president of North Star Examinations, Inc. He was formerly with the Alaska Division of Insurance for 27 years and served as its Chief of Market Surveillance. Mr. Koch chaired the NAIC Working Group that drafted the current Market Conduct Examination Handbook. He can be contacted at Phone: (907) 789-9497 or Email: dkoch@ptialaska.net

Market conduct exam pitfalls

continued from preceding page

because such behavior usually results in a violation of some statute or is harmful to the public. For example, rampant misrepresentation usually will raise strong doubts that the insurer's behavior is ethical. The standards and test found in the Handbook are generally objective indicators that can measure this behavior. Factors such as attitude and reaction may be somewhat more subjective but no less apparent to the regulator.

An insurer considering some form of self-analysis may wish to ask itself some questions such as:

Does management want to behave in a correct and ethical manner?

What steps has management taken to attempt and assure that its actions are ethical?

Does the company have a written statement of the standards of ethical behavior it expects its employees to follow? If so, are these standards tested in any meaningful way?

Attitude

Examiners experience a wide range of attitudes as they go about the process. My instruction to my examiners was always to be cordial but firm. Listen to explanations offered, evaluate on the basis of what you know and observe, and react accordingly. The fact that a company may not like or want to be examined is no excuse for negative, belligerent or discourteous treatment of the examiners. Such an attitude is almost always a reflection of what will be seen as the standards and tests are applied during the examination.

Some years ago I led a three-member examination team on a short duration, targeted examination. The company squeezed the team and its three computers into a room that was barely large enough for one person, even though we observed offices that were clearly more appropriate and vacant. The team literally had to file into the workroom in the order they were to

sit. The coordinator was rarely available and we were placed as far from his office as was possible to be and still be on the premises. A phone was made available to us in another office distant from the one in which we worked. Everything we asked for was questioned by the company. We were made to feel acutely unwelcome. I instructed my team to grin and bear it.

The results of this examination were not a surprise, and I applied extra steps to assure that the results were not vindictive. All of the tests applied failed. In some cases the failure rates were 100% but in no case were they less than 50%.

I am not sure what the company thought it was accomplishing with its attitude. Perhaps the

thinking was that if we were made to feel uncomfortable, we would not complete the examination. My first reaction to a bad attitude is to pose the question, what are they hiding?

Some questions the company may wish to consider are:

Have all persons who might come in contact with the examiners been advised of their presence?

Have all persons been advised to be cooperative and responsive? Does the company have a written procedure for dealing with examinations?

Obnoxious behavior can be a two-way street. If an examiner is conducting himself or herself in an inappropriate manner, it should be documented and reported to the examiner-in-charge or to the examination supervisor or administrator.

Compliance

A failure to comply with state statutes can be an expensive proposition. Compliance is important and a company cannot expect to achieve it without some conscious effort. Examiners will generally look for some kind of formal address to compliance.

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I have always wondered how a company can hope to understand the statutes to which it is subject if it does not have a copy of those statutes to reference.

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Market conduct exam pitfalls

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Does the company have written procedures dealing with compliance issues? Are procedures sensitive to jurisdictional differences?

Has the company done its homework to assure that each product it offers complies with any state limitations or prohibitions?

Have product offerings been reviewed in light of the state unfair trade practice statutes?

Measurement

One of the pitfalls that management frequently falls into is the failure to establish meaningful measurements or feedback devices to test the effectiveness of its directives.

About five years ago, I led an examination where we did a review of all the policies issued for Alaska policyholders.

The result of the examination was that only one error was found in the company's entire book of Alaska writings. We found that the company had already detected the potential for that kind of error and had established an internal task force to work on a way to prevent the error. We also found that the company would, on a semiannual basis, review 25 files for each of its underwriters and claims persons.

The tests in the review were more stringent than those applied in our examination process. The results of these tests became a part of the evaluation of its employees. They were used to determine where additional training was necessary. Further, the company applied the process in a manner that was accepted and welcomed by the employees. The company had designed a method for providing concrete evaluation of the effectiveness of its directives.

This approach may be difficult to implement in

some situations but does suggest that sound measurement is not only possible but can achieve effective results.

I have always been disturbed by the management style that emulates the "hear no evil, see no evil, speak no evil" monkeys, since it is assured to result in problems and errors. The measurement process needs

to be written, formal, and documented if it is to have any value.

Some questions a company may wish to pose for itself include:

Does the company have a written process for self-evaluation? Does the company have controls in place to test that its compliance efforts are valid?

Are the company compliance efforts monitored on a regular basis? How are the efforts evaluated?

Is a process in place to respond to the company's identified areas needing improvement or correction?

Reaction-Proaction

During my years as a regulator, it was rare that my staff or I had the opportunity to be proactive. Regulatory agencies tend to be reactive due to the vast amount of ground to be covered with limited resources, both personnel and funding.

I can therefore understand why a company may take offense at being accused of being reactive instead of proactive. Nevertheless there is a somewhat different incentive at work for the company.

Reaction suggests that you are accepting a level of error that may not be immediately discernable to you that can result in fines and penalties. We all know some significant examples of that scenario. A regulator truly appreciates a company that takes proactive steps to

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Market conduct exam pitfalls

avoid error and the challenges they pose. It means that the regulator can shift attention to someone who needs it.

Coordinator

From the viewpoint of the examiner the most important person with whom he or she will be in constant contact is the coordinator. The coordinator should be a person in whom the management of the company has considerable trust. The coordinator should thoroughly understand the workings of the company as well as the examination process. The impressions telegraphed by the coordinator will be the impressions the examiners will have of the company.

The coordinator does not have to know all the answers but should know where to find them. Walking on water helps. This is a position that can generate considerable grief for a company if care is not exercised. Examiners tend to become impatient with a company that provides an incompetent person as a coordinator or one who has no authority to act.

Some questions the company may wish to consider include:

Does the company have a designated examination coordinator, and what other duties does that person have?

What kind of training is provided for the coordinator? Is it formal or is it hit or miss?

Does the coordinator have sufficient authority to assure the smooth and expeditious progress of an examination?

IMSA Reliance

One recent and significant development in the life insurance area is the process of self evaluation created

by the Insurance Marketplace Standards Association (IMSA). This is a proactive move by the industry that everyone hopes will significantly reduce the errors now seen. A caution is offered to those who see this as a replacement for the market conduct examination.

The IMSA standards have a different focus than does a market conduct examination and should not be viewed as a replacement. To the extent that adherence

to IMSA standards results in reduced consumer abuse, it will have an impact on the market conduct examination process. Many regulators have adopted a wait-and-see attitude concerning IMSA and its impact.

It will take time and testing to determine if adoption of IMSA standards by a company has the impact on market conduct examination results that insurers want to achieve.



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Communication

Contact with a regulator is often an unsettling experience. Most regulators I know are serious about doing the job for which they are responsible in as thorough a manner as time permits. Most are not ogres. Most want to be helpful and assist the company to comply with statutes, rules and regulations. Patience is stretched when the contact at the company uses dilatory tactics, is evasive, is unresponsive, is uncommunicative or does not live up to commitments made.

The company is entitled to sufficient information with which to prepare for an examination. This can take the form of an information request or a coordinator's handbook. Since the terminology used by the regulator may differ from that used by the com-

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Market conduct exam pitfalls

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pany, it is critical that misunderstandings be avoided.

I have found that one of the most useful exercises in the process is the pre-examination conference where every step of the process is detailed, expectations are discussed, concerns are noted, understanding is enhanced and communications are established. I view this as a responsibility of both the regulator and the company.

A point of frustration for the examiner occurs when the authority of the company-appointed coordinator is withdrawn after the report has been issued. Typically the company has given every indication that the coordinator has the authority to provide responses to the examiners questions, criticisms or inquiries.

At the end of the examination the authority is rescinded and the company backs away from the responses given by the coordinator. This usually happens when legal counsel from the company sees the draft report and realizes the company's exposure.

Understanding Statutes

I have always wondered how a company can hope to understand the statutes to which it is subject if it does not have a copy of those statutes to reference. This is particularly true of those statutes that require filings of rates or forms and the procedures that accompany them. Trade practice statutes are also important.

The pitfalls in these statutes vary from state to state and need to be communicated to those persons dealing with those states. Osmosis does not work very well in this case.

A subset of understanding statutes is training. Have employees required by statute to make certain disclosures concerning the company's products been properly and correctly trained concerning the content, timing,

and delivery of such disclosures? If not, then communication will fail and errors if not violations will occur.

Documentation

The one kind of communication the examiner will expect to see in almost every aspect of an examination is documentation. I take the position, and I know that many of my peers do also, that if the documentation is not present then the action did not occur.

If a disclosure is supposed to occur and the company file does not disclose that it was made, then it did not occur. My examiners and I have made that kind of

criticism in examination reports over the years. Documentation cuts argument and conjecture. It is important for the company's protection as well as the policyholder.

At best, failure to document is foolhardy. At worst, it can be expensive.

Conclusion

The comments made here represent a fairly broad brush of the considerations relevant to avoiding problems that can come from a market conduct

examination. Some insurers will need assistance in analyzing its needs and options. Others are capable of performing such analysis internally. Whatever approach is utilized, it is important to keep the lines of communication open with the Insurance Department.

Challenges are more effectively resolved in a cordial and candid setting than in a contentious one. Generally, insurance departments want to prevent problems rather than react to them.

In all the years that I have been involved in the examination process, I have only had one company request an examination. That company saw it as a tool that it could use to identify and repair problems before they became ingrained in their systems. The spirit of cooperation found in that examination was appreciated and productive.

The lines of communication opened by that approach are valuable to the regulator and to the company. ■



IRES State Chapter Reports

Oregon

by Jann Goodpaster, CIE
Oregon IRES Chapter

The Oregon travel rules only allow a limited number of employees to attend the annual CDS. In order to meet continuing education requirements and provide ongoing educational training, the Oregon Insurance Division has sponsored monthly IRES meetings.

At first we shared the agenda with the SOFE members. However, due to the increased interest in market conduct related agenda items, we split into IRES and SOFE meetings. The two groups meet concurrently and share agenda items when the topic spans both financial and market conduct issues.

Speakers for the meetings have been readily available. First, we have tapped our own resources within the division and other state agencies. Division employees have presented hour-long breakout sessions on topics such as health insurance reform, equity-indexed annuities and disability insurance.

The insurance industry in our state has been extremely helpful in providing speakers. Recent topics included sessions on the use of credit reports in automobile underwriting, total loss adjustments and several topics related to HMOs.

We have also found speakers from related industries. InsWeb sent Ron Kuhnel to present a session on fraud over the Internet.

The monthly meetings and breakout sessions have been informative, a source of continuing education credits, and have provided an opportunity for individuals from the various sections of the Insurance Division to meet and interact.

I would encourage other states to establish chapter IRES meetings and breakout sessions. It can be done quarterly, bi-annually or any other schedule supported by the individual state's management.

Individuals interested in more information on Oregon's experience with monthly meetings may contact Jann Goodpaster at 503-246-3715, fax 503-245-7318, or email: janngood@aol.com.

New Jersey

by Frank Seidel, FLMI, CFP, CFE, CIE

At the end of this November, our member John A. Conover, CIE, CPM, CFE, will retire from his regulatory job with the New Jersey Department of Banking and Insurance. During his state government career, he worked as field examiner, chief examiner and finally Assistant Commissioner responsible for the financial areas of insurance regulation. John Conover, Sr. had been SOFE Vice President, responsible for SOFE's continuing education program, and SOFE's first and only New Jersey state chair since the founding of SOFE.

John Conover was an early IRES supporter and has been an IRES member for more than 10 years. He would often post articles from *THE REGULATOR* on his department's bulletin board. He had always advocated close cooperation between SOFE and IRES.

John Conover not only extinguished regulatory fires in financial crises, but he also is a volunteer fireman and was volunteer fire chief in Hamilton Township for 5 years. During the last two years, he was recovering from heart problems and reduced his work schedule.

Insurance regulation is losing one of its most senior and most experienced civil servants. John used to enjoy playing soccer — may he get a kick out of his retirement!

REGULATOR'S ROUNDUP

EDITOR'S NOTE: Welcome to Regulator's Roundup. Written by Dee Dee Gowan, the Roundup will summarize key court decisions, bulletins and announcements from around the country. We're very excited about this new feature and hope you share our enthusiasm.

by **Dee Dee
Gowan**



FLORIDA - Cooperation Clause Does Not Override the Attorney-Client Privilege

The Florida Court of Appeals has decided that the cooperation clause found in liability insurance policies does not override the attorney-client privilege. See Eastern Air Lines, Inc. v. United States Aviation Underwriters, Inc., slip op., 1998 WL 537200, *3 (Fla. App. 1998). In Eastern, the insureds asserted the attorney-client privilege and refused to produce certain documents during a discovery dispute with their insurer. In support of its decision to uphold the privilege, the court explained that, in Florida, the cooperation requirement in a policy only applies when the insured and insurer are in a fiduciary relationship. Where a fiduciary relationship exists, the insurer may compel production of documents on the basis of the cooperation clause. However, where the insurer and the insured are in an adversarial position, as was the case in Eastern, the attorney-client privilege prevails.

INDIANA - Agent Licensing For Credit Insurance

The Indiana Insurance Commissioner has issued a new bulletin to address the licensing requirements for credit insurance agents and to withdraw a previous "unpublished" bulletin that was causing confusion regarding those requirements. The unpublished bulletin took the position that only one individual at each location where credit insurance is sold or solicited must be licensed. The new bulletin explains how this position is inconsistent with Indiana law. Specifically, licenses are required for each person who: (1) makes application for, procures, negotiates for, or places for others, any individual policy of

Dee Dee Gowan is an attorney with the law firm Baker & Daniels in Indianapolis, Indiana and focuses her practice on insurance regulatory matters.

credit insurance or a master group policy of credit insurance; or (2) secures and furnishes information for the purpose of group, blanket or franchise health insurance, or for enrolling individuals under such plans or issuing certificates thereunder if a commission is paid to such person. See IN Bulletin No. 88 (July 1, 1998).

ILLINOIS - Insured's Failure to Read Policy Does Not Bar Suit Against Broker

The Illinois Court of Appeals has ruled that an insured's failure to read and understand the terms of an insurance policy does not bar recovery against his broker. See Perelman v. Fisher, slip op., 1998 WL 540961, *5 (Ill. App. 1998). Perelman, an insured, sued his broker alleging that the broker breached his fiduciary duty by failing to obtain a disability policy providing cost-of-living adjustments as requested by the insured. The court explained that the relationship between the insured and his broker is a fiduciary one and, therefore, the broker is required to exercise competence and skill in procuring insurance coverage. Accordingly, if the broker does not follow the insured's instructions in obtaining the insurance, he may be found to have breached his fiduciary duty to the insured. The insured does not have a duty to "realize what's in the policy and what is not" before he can sue his broker for breaching this fiduciary duty.

KENTUCKY - "Any Willing Provider" Law Saved from Federal Preemption

A federal district court has determined that Kentucky's Any Willing Provider (AWP) law is saved from federal preemption under the Employee Retirement Income Security Act (ERISA) as a law that "regulates insurance." Community Health Partners v. Commonwealth, 1998 WL 325259, *13 (W.D. Ky. 1998). Kentucky's AWP law prohibits health benefit plans from discriminating against providers that are located within their geographic coverage area and

continued from preceding page

that are willing to meet the plan's terms and conditions for participation. In general, ERISA subjects employee benefit plans to federal regulation. However, ERISA also has a "savings clause" which exempts from federal preemption any state law "which regulates insurance." Although the court concluded that Kentucky's AWP law was sufficiently related to employee benefit plans to fall within the scope of ERISA, the court also concluded that the statute regulated insurance and, therefore, was saved from preemption under ERISA's savings clause.

LOUISIANA - Use of Y2K Endorsements and Exclusions

The Louisiana Insurance Rating Commission (LIRC) has issued a new Bulletin to notify all property & casualty insurers of the proper procedures regarding the use of Year 2000 endorsements and exclusions. Blanket use of Y2K liability exclusions is not allowed, and insurers using Y2K endorsements or exclusions must engage in individual underwriting. Company filings must include sufficient information for the Louisiana Department of Insurance to determine if use of the endorsement or exclusion is justified. A notice must be sent with any policy that is renewed with a Y2K endorsement or exclusion. The notice must inform the policyholder that the endorsement or exclusion has been added to the policy and clearly explain the effect on coverage provided under the policy. If you have any questions regarding this Bulletin, you can reach the LIRC staff at (504) 342-5202. *See* LA Bulletin LIRC No. 98-04 (Aug. 7, 1998).

NEBRASKA - Complete Divestiture Authorized Under Holding Company Act

The Eighth Circuit has interpreted Nebraska's Insurance Holding Company System Act (NIHCSA) as authorizing the court to order a complete divestiture of all stock held by purchasers who violate NIHCSA by acquiring a controlling interest in a domestic insurer without prior approval of the Nebraska Department of Insurance. National American Ins. Co. v. Centra, 1998 WL 452135, *5 (8th Cir. 1998). The court explained that NIHCSA gives the court remedial power over any voting securities of a statute-violator. Accordingly, that remedial power is not limited to those securities whose acquisition constituted a violation of the statute but, rather, all of the stock owned by the statute-violator.

NEW YORK - Third-Party Beneficiary Disclaimers in Retrocession Agreements

The Sixth Circuit has determined that where an insurer cedes insurance to a reinsurer who then retrocedes the insurance, and where the retrocession agreement contains a third-party beneficiary disclaimer, the cedent can not bring suit directly against the retrocessionaire on the theory that the cedent was a third-party beneficiary. Nationwide Mut. Ins. Co. v. Home Ins. Co., 1998 WL 442673, *3 (6th Cir. 1998). Nationwide brought an action for breach of its reinsurance contract against both its reinsurer and the retrocessionaire. The third-party disclaimer in the retrocession agreement barred any person or entity other than the parties to the agreement from enforcing its terms. Accordingly, the insurer was limited to a direct suit against its reinsurer.

OKLAHOMA - Executive Employment Contracts Require Commissioner's Prior Approval

The Oklahoma Court of Civil Appeals affirmed the Oklahoma Insurance Commissioner's determination that employment contracts of the president and executive vice president of a domestic insurer were subject to prior approval by the Commissioner. Anderson v. State ex rel. Crawford, slip op., 1998 WL 382306, *6 (Ok. App. 1998). The Oklahoma courts have not previously addressed this issue. The Commissioner had determined that the executive employment contracts were "management agreements" which, under Oklahoma law, must be filed with the Commissioner for approval. The insurer argued that the employment contracts were not management agreements because they did not give the executives the right to manage the company. The court was not persuaded by the insurer's

continued next page

IRES CDS: Next Up

- 1999 — Las Vegas. Aug. 1-3 Bally's
- 2000 — New Orleans. July 30-Aug. 1 Hyatt Regency
- 2001 — Baltimore. Aug. 6-8 Hyatt Regency Inner Harbor

REGULATOR'S ROUNDUP

continued from previous page

argument and emphasized that the executives were being hired to manage the company.

TEXAS - Managed Care Entities Remain Liable for Poor Health Care

A federal district court has determined that the provisions of the Texas Health Care Liability Act (THCLA) making managed care entities liable for poor health care are not preempted by ERISA. Corporate Health Ins. Inc. v. Texas Department of Ins., 1998 WL 651003, *31 (S.D.Tex. 1998). The court explained that these particular provisions are saved because they address the quality of benefits actually provided and not the determination of benefits. However, the court also decided that ERISA does pre-empt THCLA's provisions establishing an independent review process for adverse benefit determinations. Additionally, ERISA pre-empts THCLA's provisions prohibiting managed care entities from removing providers from their plans for advocating on behalf of enrollees and from including indemnification clauses in their contracts with providers. The court also ruled that the preempted provisions are severable from the valid provisions.

UTAH - State Insolvency Proceeding Laws Pre-empt the Federal Arbitration Act

The Tenth Circuit has determined that a state receivership court's blanket stay of proceedings means that a federal court can not compel arbitration. Davister Corp. v. United Republic Life Ins. Co., 1998 WL 546135, *5 (10th Cir. 1998). Davister sought to compel arbitration of a dispute with the insolvent insurer. In support of its action, Davister argued that the Federal Arbitration Act (FAA) mandated arbitration in place of state litigation when the parties have contracted to submit disputes to arbitration. The Utah Liquidator relied on the McCarran-Ferguson Act and Fabe to argue that its regulation of insurance under the insolvency proceeding statutes trumped the FAA. The Tenth Circuit agreed with the liquidator and explained that the statute consolidating all claims against a liquidating insurer was enacted to protect policyholders.

VERMONT - Indexed Life Insurance Products

The Vermont Commissioner of Insurance has issued a new bulletin addressing the Insurance

Department's handling of indexed life insurance products and the requirements for the sale of these products. The purpose of these new requirements is to insure that life insurance companies provide adequate disclosure and promote consumer understanding of indexed insurance products. One of these requirements is that the products must contain the minimum guarantees required by Vermont's nonforfeiture laws. Additionally, sales materials must not focus solely on the investment aspects of the product and must emphasize the primary purpose of the product's insurance features. The bulletin also lists specific requirements for filing, the buyer's guide, and annual policy reports. If you have any questions concerning this bulletin, contact Thomas Crompton, Chief of Life and Annuities, at (802)828-4843. See VT Bulletin 121 (Aug. 1. 1998).

WASHINGTON - New Medicare Guide

The Washington Insurance Commissioner has announced a new publication, *Medicare Choices: A Medicare beneficiary's guide to options under Medicare*, available to seniors who may be considering changing to a different system of Medicare benefits in the coming months. The publication is available on-line at the Washington Insurance Commissioner's web-page (www.wa.gov/ins) and can be ordered toll-free by calling 1-800-397-4422. Additionally, the University of Washington has pledged its expertise and resources to support the state's consumer advocacy program called the Statewide Health Insurance Benefits Advisors (SHIBA). SHIBA is a statewide network of trained volunteers who educate, assist and advocate for consumers about their rights and options regarding health insurance, so consumers can make informed choices. ■

If you have any suggestions for topics from your state for the next newsletter, or if you have questions or want additional information about any of the above news items, please call Dee Dee Gowan at (317) 237-1217 or send an e-mail to dgowan@bakerd.com.

MEET YOUR BOARD MEMBERS

Edward Mailen

CIE, FLMI, CLU, CPCU, AIC, ARP, ALHC
IRES Board of Directors

A regulator for 18 years, currently director of Agents & Brokers Division, Kansas Insurance Department.

If I weren't a regulator, I'd be: "most likely a building contractor."

The biggest issue facing insurance regulation today:

"It appears to me that the biggest problem we face is the need to adapt to the changing insurance climate and our need to regulate in a more uniform manner so that state regulation is not pre-empted by the federal government."

My proudest accomplishment: "The fact that I have raised two wonderful daughters without losing my hair."

If I could do one thing over, it would be: "Attend law school."

Family: "Married to Rita for 34 years and we have two daughters, Cheryl, who lives and works in Topeka, and Dana, a freshman at KU."

Hobbies: Hunting, softball and woodworking.

Favorite book: *Treasure Island*

Favorite quote: "Impossible only means you haven't found the solution yet."

Nancy S. Thomas

CFE, CIE, CPA
IRES Board of Directors

A regulator for 19 years, currently with the Delaware Department of Insurance

If I weren't a regulator, I'd be: "an insurance consultant."

The biggest issue facing insurance regulation today:

"the convergence of the financial services industry."

My proudest accomplishment:

"giving birth to my daughter Lauren in January, 1997. She has brought an immeasurable amount of joy in our lives."

If I could do one thing over, it would be: "to have gone to law school immediately after college. Instead, I became a CPA."

Family: "I have been married 17 years to my husband Tim and we have one daughter, Lauren Anne, who is 19 months old."

Hobbies: Aerobics, taking swimming lessons with my daughter, long walks and reading.

Most recent book I've read: *How Could You Do That?* by Dr. Laura Schlessinger

Favorite quote: "In matters of style, swim with the current, in matters of principle, stand like a rock." – Thomas Jefferson

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The hazards and
pitfalls in market
conduct. **PAGE 6**



BULLETIN BOARD

√ **Welcome** to these new IRES regulator members:
Tiffany A. Geis, NE; Suzette D. Green Wright, AIE,
UT; Sylvia Gregory-Wotherspoon, NE; Catherine L.
Hoban, NE; Theodore J. Johnson, NE, John J.
Koenlg, NE; Jorge Rodriguez, FL; Mari A. Sanchez,
AZ; David D. Sell, NE; Zackery B. Smack, CA; Larry
C. Stoval, OH; Robin S. Szwaneek, NE; JoAnn
Wheaton, DC; Robert A. White, NE.

√ 1999 dues renewal notices: Will go out in late
December so watch the mail. If you have changed
address or jobs, let us know.

√ Former Georgia market conduct examiner,
CPCU, AIAIF, ASF, seeks market conduct, compli-
ance or consultant position with state agency or
insurer. Please e-mail replies to: joewar@alltel.net

√ See page 5 this issue for very important informa-
tion on your IRES continuing ed credits!

NEXT MONTH:
**Avoiding a “bad”
market conduct report
in New York.**